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No.

Supreme Court, U.S.
FILED

In The

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Supreme Court of the United States

JOSEPH F. SPANIOL, JR.

October Term, 1986

TOWNSHIP OF BRICK, A Municipal Corporation of the County
of Ocean and State of New Jersey,

Petitioner,

vs.

BLOCK 48-7, LOTS 34, 35, 36, KENLAV, c/o Party Time Inn,
and Other Lands,

-and-

ROBERT V. PASCHON and BYRON KOTZAS,

Respondents.

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF NEW JERSEY**

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& WHITE

Attorneys for Petitioner

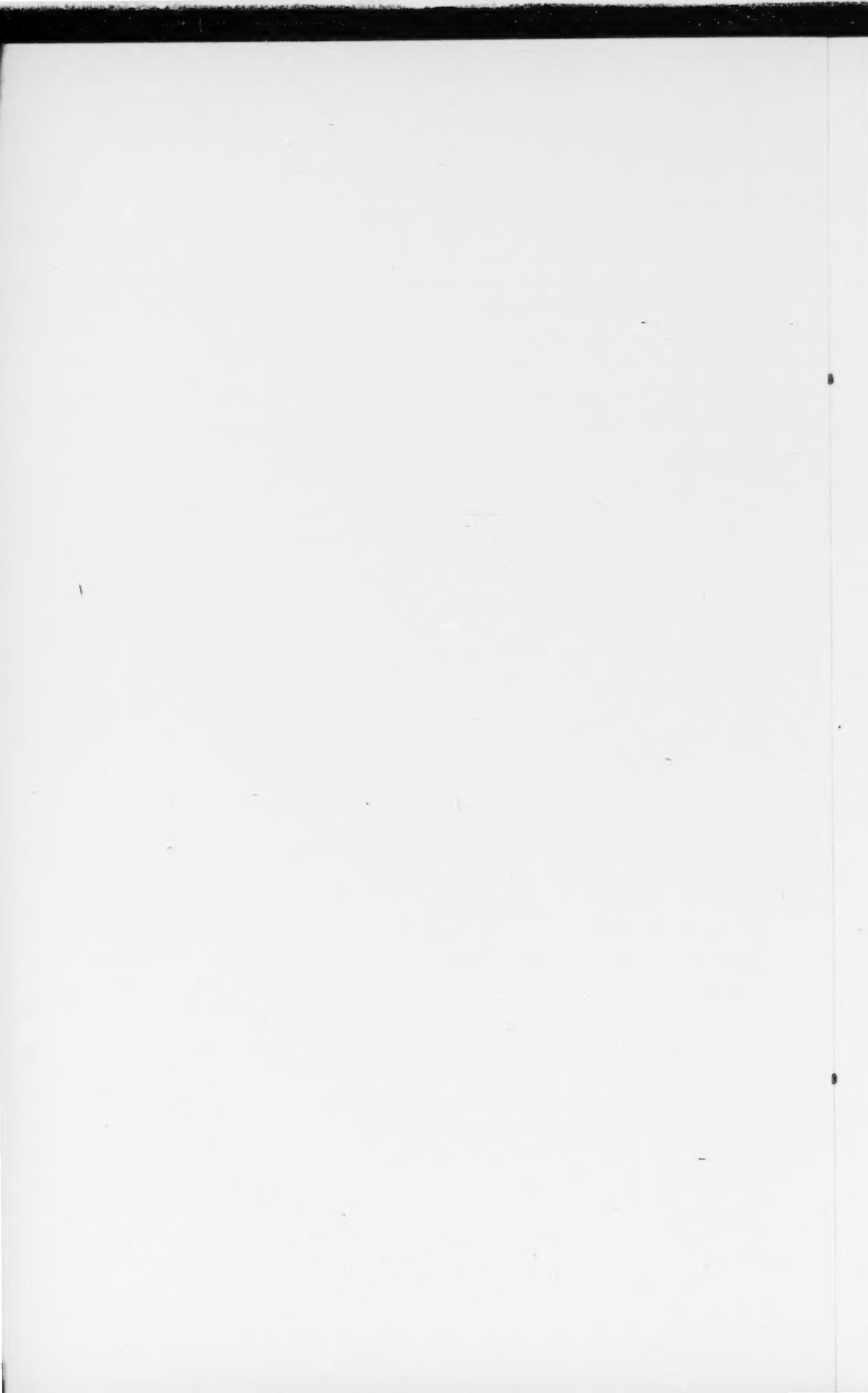
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QUESTION PRESENTED

Whether "conscious awareness", as defined by the New Jersey court and applied to the notice provision of the New Jersey In Rem Tax Foreclosure Act, is a constitutionally required element for purposes of providing delinquent taxpayers with notice of tax foreclosure proceedings involving their properties.

LIST OF ALL PARTIES TO THE PROCEEDINGS

Petitioner in this action is the Township of Brick, a municipal corporation of the County of Ocean, State of New Jersey.

The remaining parties to this proceeding are:

1. Block 48-7, lots 34, 35, 36, 37, 38, 39, assessed to Kenlav
c/o Party Time Inn.
2. Block 54-6, lot 13, assessed to Unknown c/o Township.
3. Block 68, lots 23, 24, 25, assessed to Triarch Corp.
4. Block 68, lot 50, assessed to Alan B. Burghardt.
5. Block 72, lots 145, 146, assessed to Naomi A. Dutcher.
6. Block 76, lot 81, assessed to Carl E. and Anne E. Lappke.
7. Block 109, lot 22, assessed to Rhea M. Gordon.
8. Block 150B, lots 6, 7, 8 assessed to Clarence C. Sibley,
IV, et al.
9. Block 190, lot 12, assessed to Estate of Isaac Osborn, c/o
K. Osborn
10. Block 194, lot 9, assessed to Estate of Peter W. Havens
c/o Township
11. Block 195, lot 2, assessed to Ennis c/o Anton Gant
12. Block 195, lot 21, assessed to Rhea M. Gordon.

13. Block 195, lot 25, assessed to Unknown c/o C. Zimmel.
14. Block 196, lots 5-1, 5-3, 5-4, assessed to A. T. Keefe Dev. Co.
15. Block 196, lot 5-5, assessed to Naomi Dutcher and Minnie Keefe.
16. Block 196, lot 9, assessed to Choapi, Inc. c/o M. B. Anton
17. Block 206-24, lots 51, 52, assessed to Anna Parsil.
18. Block 211, lot 12, assessed to Ilse B. D. Chambers.
19. Block 228-27 lot 13 , assessed to Nina B. Knapp c/o W. Nelson Knapp
20. Block 235-26, lot 20, assessed to Elsie K. Vannote c/o A. Redden
21. Block 236-25, lot 36 assessed to Elsie L. Serverson.
22. Block 241-22, lot 7, assessed to Nina E. Knapp c/o W. Nelson Knapp.
23. Block 242-21, lot 15 assessed to Joan Fronapfel.
24. Block 249, lot 1, assessed to Unknown c/o David Beaton.
25. Block 254-14, lots 15A, 16, assessed to John F. & Joan O'Malley.
26. Block 257, lot 13A, assessed to Unknown c/o Township.
27. Block 275-71, lot 86, assessed to Joseph H. & Lucy J. Decabo.

28. Block 277-4, lots 54, 55, assessed to Leon DeFrance.
29. Block 307-14, lot 54, 55, 56, assessed to Mary Pierson
c/o S. W. Preus.
30. Block 323, lot 3, assessed to 301 Drum Point Road, Inc.
31. Block 323, lot 9-4, assessed to Chas. W. & Geo. T.
Osborn.
32. Block 324, lot 14, assessed to C. W. Morton & G.
Woverton.
33. Block 324, lot 19A, assessed to Est. of William Brewer
c/o Township.
34. Block 324-C12, lot 5, assessed to Ronald E. & Carol
Owens.
35. Block 324-C20, lot 1, 2 assessed to Jerrilyn K. Becker.
36. Block 378, lot 5, assessed to Condominium Services, Inc.
37. Block 380, lot 14, assessed to Unknown c/o A. Silverman.
38. Block 389-39, lot 2, assessed to Unknown c/o Township.
39. Block 483-5, lots 34, 35 assessed to Roy Mathews.
40. Block 485-3, lots 33, 34, 35 assessed to William A.
Rosenbauer.
41. Block 507-4, lots 17, 18 assessed to Lance G. and Carolyn
M. Larsen.

42. Block 507-4, lots 19, 20 assessed to Lance G. & Carolyn M. Larsen.

43. Block 507-4, lots 21, 22, assessed to Lance G. & Carolyn M. Larsen.

44. Block 522-29, lots 11, 12, assessed to Vincent & Alice Capozio.

45. Block 547, lot 7-A, assessed to Henry J. Schiess, Sr.

46. Block 547, lot 7-A, assessed to Henry J. Schiess, Sr.

47. Block 547-A, lot 17, assessed to Drum Brick, Inc.

48. Block 562-31, lots 13, 14, assessed to Robert C. & Evelyn B. Beisser.

49. Block 563-30, lots 64, 65, assessed to Thos. Kozlowsky c/o Eisenstein.

50. Block 577-16, lots 13, 14, assessed to Paul Garbarini.

51. Block 577-16, lots 22, 23 assessed to Mary McGurk.

52. Block 595-11, lot 8, assessed to Carole E. Szepesi.

53. Block 646, lot 10 assessed to Unknown c/o Ann Silverman.

54. Block 646, lot 16, assessed to Est. of Rebecca Gant c/o A. Silverman.

55. Block 646, lot 25-1, assessed to Thomas VanNote c/o David Beaton.

56. Block 673, lots 24, 38, 40, assessed to Duquesne Builders, Inc.

57. Block 673, lot 37, assessed to Duquesne Builders, Inc.

58. Block 673, lot 51, assessed to Edith Glass c/o A. Silverman.

59. Block 673, lot 52, assessed to Nellie Larrabee c/o A. Silverman.

60. Block 673-11, lots 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54 assessed to Duquesne Builders, Inc.

61. Block 673-11, lot 55, assessed to Duquesne Builders, Inc.

62. Block 685, lot 5, assessed to Robert V. Paschon & Byron Kotzas.

63. Block 685, lot 6, assessed to Robert V. Paschon & Byron Kotzas.

64. Block 685, lot 7, assessed to Byron Kotzas and Robert V. Paschon.

65. Block 685-2, lot 12, assessed to Kenneth P. & Arlene Hendricks.

66. Block 687-13, lots 3, 4, assessed to Aaron & Clara Minsky.

67. Block 687-13, lots 19, 20 assessed to Aaron & Clara Minsky.

68. Block 687-13, lots 21, 22, 23, 24, assessed to Karka Associates.

69. Block 700-1, lot 1, assessed to Unknown c/o Township.
70. Block 701, lot 3-1, assessed to Fernando B. Pezarras.
71. Block 726-5, lot 14, assessed to Spruce Land Co.
72. Block 726-5, lot 14, assessed to Spruce Land Co.
73. Block 383-29, lots 92, 93, 94 assessed to Richard S. & Laura A. Barry.
74. Block 446-D12, lot 1, assessed to Joseph & Florence LaValle.

The only real parties in interest are petitioner and respondents Robert V. Paschon and Byron Kotzas who participated in the proceedings below.

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OPINIONS BELOW

The trial court's opinion on the first remand (Appendix E,
infra, 23a-45a) is not reported, and the appeal therefrom

(Appendix D, *infra*, 14a-22a) is reported at 202 N.J. Super. 246. The final appellate opinion (Appendix B, *infra*, 3a-7a) is not reported.

JURISDICTION

The New Jersey Superior Court, Appellate Division (Appendix B, *infra*, 3a-7a), had ruled in this matter on May 30, 1986. A petition for certification to the Supreme Court of New Jersey was denied on December 22, 1986 and filed on December 24, 1986. (Appendix A, *infra*, 1a-2a). This Court has jurisdiction to review the decision by writ of certiorari pursuant to 28 U.S.C. § 1257(3). 28 U.S.C. § 2403(b) may be applicable [Supreme Court Rule 28.4(c)].

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Fourteenth Amendment to the United States Constitution provides in relevant part:

No State shall. . .deprive any person of life, liberty, or property, without due process of law . . .

2. The New Jersey In Rem Tax Foreclosure Act, N.J. Stat. Ann., § 54:5-104.29 *et seq.* (West 1986), provides in relevant parts:

Any municipality may proceed, In Rem, pursuant to the provisions of this act, summarily to bar rights of redemption, after said certificate has been recorded in the office of the county recording officer (§ 54:5 104.32).

The copy of the complaint filed in the office of the county recording officer and the publication, service, and posting of the notice as provided by the Rules Governing the Courts of the State of New Jersey shall be notice to the world including all persons claiming any right, title, interest in, or lien upon the land sought to be affected by said complaint, whether or not the names of said persons appear in said complaint, of the institution of said foreclosure proceedings in rem, and that unless said lands be redeemed in the cause as hereinafter provided, the right, title, interest, or lien of any such persons and the claim of any or all other persons, whether such right, title, interest, lien, or claim has or shall have become vested or shall have arisen or may arise prior to or subsequent to the filing of said complaint, shall be foreclosed and forever debarred and that an indefeasible estate in fee simple in said lands shall be vested in the plaintiff, by the judgment of the said court, as provided in this act (§ 54:5-104.42).

3. Rules Governing the Courts of the State of New Jersey provide, in relevant parts:

Rule: 4:50-1 *Relief from Judgment or Order*

On motion, with briefs, and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment or order for the following reasons: (a) mistake, inadvertence, surprise, or excusable neglect; (b) newly discovered evidence which would probably alter the judgment or order and by which due diligence could not have been discovered in time

to move for a new trial under R.4:49; (c) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (d) the judgment or order is void; (e) the judgment or order has been satisfied, released, or discharged, or a prior judgment or order upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or order should have prospective application; or (f) any other reason justifying relief from the operation of the judgment or order.

Rule 4:64-7 *In Rem Tax Foreclosure*

(a) Contents of Complaint. In an action in the Superior Court to redeem from the lien of a certificate for the nonpayment of taxes or other municipal lien, brought under the In Rem Tax Foreclosure Act, the complaint shall be verified by the tax collector and shall set forth (1) the tax foreclosure list; (2) the name of the person or one of the persons who, according to the records in the office of the county recording officer, appears as a transferee or purchaser of title to the land to be affected by the tax foreclosure proceedings, and the book and page or date and instrument number of the instrument by which such person acquired title; or the word "unknown" if no such person can be discovered by a search of the records of ownership in the county recording officer's office for a period of 60 years next preceding the preparation of the tax foreclosure list; and (3) a demand for relief pursuant to the act. The complaint may also include a description by metes and bounds of the land to be affected.

(b) Publication; Contents of Notice. The plaintiff shall publish once a notice of foreclosure in a newspaper generally circulated in the municipality where the lands are affected stating (1) that it has commenced an action in the Superior Court by filing a complaint on a specified date to foreclose and forever any and all rights of redemption of the parcels described in the tax foreclosure list contained in the notice and that the action is brought against the land only and no personal judgment may be entered therein; (2) that any person desiring to protect a right, title, or interest in any said parcel by redemption or to contest plaintiff's right to foreclose, must do so by paying the amount required to redeem (which shall be set forth in the notice) plus interest to date of redemption and such costs as the court may allow, prior to the entry of judgment therein, or by filing and serving an answer to the complaint setting forth defendant's answer within 45 days after the date of publication of the notice; and (3) that in the event of failure or answer by a person having the right to redeem or answer, such person shall be forever barred and foreclosed of all his right, title, and interest and equity of redemption in and to the parcels of land described in the tax foreclosure list. The notice shall contain a copy of the tax foreclosure list.

(c) Service. The plaintiff shall, within 7 days after the date of publication of the notice of foreclosure, serve a copy thereof in the manner hereinafter provided on each person whose name appears as an owner in the tax foreclosure list at his last known address as it appears on the last

municipal tax duplicate. The plaintiff shall also make such service upon all other persons who, pursuant to NJSA 54:5-104.48, as amended, have filed a notice with the tax collector specifying a title, lien, claim, or interest in any of the lands sought to be affected by said complaint. Such service shall be made in the manner provided by R. 4:4-4(a) or by registered or certified mail, return receipt requested, to his last known address; or if the party refuses to claim or to accept delivery, by ordinary mail to his last known address. In addition to the foregoing, the plaintiff shall mail a copy of the notice of foreclosure, by ordinary mail, to the Attorney General.

(d) **Posting.** The Plaintiff shall, within 15 days after the date of the publication of the notice, cause a copy thereof to be posted in the office of the tax collector of the plaintiff municipality and in the office of the county recording officer of the county in which the land to be affected by the action is, and in 3 other conspicuous places within the taxing district in which the land is located.

(e) **Affidavit of Compliance.** Final judgment shall not be entered as to any parcel of land until affidavits have been filed showing compliance with the publication, posting, and service requirements of this rule.

(f) **Answer.** Any person having or claiming to have a right, title, or interest in or to, or lien upon any parcel of land described in the complaint may file an answer within 45 days after the date of publication of the notice of foreclosure setting

forth in detail the nature of his interest and the grounds of his defense. The caption of such action shall refer to the cause or causes of action applicable to the land affected. Upon the filing of the answer the action shall proceed in accordance with R. 4:64-6.

(g) Final Judgment if Answer not Filed or Stricken. If no answer is filed as to any parcel or the answer is stricken, the court may enter final judgment as to the parcel on the basis of the verified complaint, proof of publication, posting, and service, and an affidavit of non-redemption. The judgment shall describe the lands affected by the description and identification thereof as the same appears in the complaint and tax foreclosure list, and shall identify each parcel of land affected by such judgment by the name of the persons appearing in the complaint and tax foreclosure list, and the book and page or date of record or instrument number, where the record of each foreclosed certificate of tax sale may be found in the office of the county recording officer. The judgment may also contain a description of metes and bounds of any parcel, together with other identifying description as the plaintiff desires to insert.

STATEMENT

The New Jersey In Rem Foreclosure Act, N.J. Stat. Ann., § 54:5-104.29 *et seq.*, provides for foreclosure by municipalities of rights of redemption of real property from tax sales. The statute was designed to expedite foreclosure of tax liens in favor of the municipalities. This statute provides that notice of an In Rem

Foreclosure action must be published, served, and posted as provided by the Rules Governing the Courts of the State of New Jersey. Thereafter, if the property is not redeemed, all rights, title, interest, lien, or claim to the property shall be foreclosed or barred in favor of the foreclosing authority.

The Rules Governing the Courts of the State of New Jersey, Rule 4:64-7(c), provides that notice of the In Rem Foreclosure action is to be served on the persons whose names appear as owners of the property being foreclosed on. This service is to be made at the person's last known address as it appears on the last municipal tax duplicate. Service by registered or certified mail is permitted.

On September 8, 1982, petitioner Brick Township, through its attorney, filed an In Rem Tax Foreclosure complaint in the Superior Court of New Jersey, Chancery Division, against, among other defendants, Block 685, Lots 5, 6, and 7, which were assessed to respondents Robert V. Paschon, a local attorney, and Byron Kotzas, a local real estate entrepreneur. No taxes on this property had been paid from the second half of 1979 through the end of 1982. The complaint in question was not actually prepared by petitioner's attorney or his staff. Instead, an outside secretary, not an employee of the township attorney, was retained to prepare the pleadings in this matter. She was an experienced person who had done foreclosures on a fee basis for fifteen years for various law firms. After the secretary prepared all of the necessary pleadings, counsel for petitioner reviewed the documents for legal sufficiency and signed them. Petitioner served the foreclosure complaint on respondents in the manner required by N.J.S.A. § 54:5-104.42 and Rule 4:64-7. Specifically, notice was posted on September 24, 1982, published in a newspaper of general circulation of September 23, 1982, and mailed by certified mail to respondent Robert V. Paschon on September 27, 1982, at his "last known address as it appears on the last municipal tax

duplicate." Rule 4:64-7(c). That address was for respondent Paschon's law office.

Before the foreclosure complaint was filed and a copy mailed to his office, respondent Paschon had moved his office from the address which appeared on the tax duplicate. He neglected, however, to notify petitioner's tax address of his current address. As a result of respondent's failure to correct and/or update the address appearing on the Township's tax duplicate, the notice of the foreclosure proceeding mailed to respondents was not delivered: Their forwarding order with the U.S. Post Office had expired.

Ultimately, petitioner sought and obtained a default judgment against these properties. The judgment was filed on February 9, 1983. Eleven months later, on January 13, 1984, respondents Paschon and Kotzas, moved by order to show cause in the trial court to be relieved from that portion of the judgment as applied to the properties owned by them. By an order dated March 1, 1984, the trial court denied respondents' application as it found no grounds which, under Court Rule 4:50, would permit vacation of the judgment (Appendix J, *infra*, 52a-61a). Instead, the trial court confirmed the judgment of foreclosure previously entered (Appendix I, *infra*, 50a-51a). Respondents, through new counsel, appealed that ruling to the Superior Court of New Jersey, Appellate Division, and also moved to supplement the record. That motion was denied by the Appellate Division, but the matter was remanded to the trial court in order that the motion to enlarge the record could be made to the trial court (Appendix G, *infra*, 46a-47a).

The trial court granted the motion to enlarge the record (Appendix F, *infra*, 43a-45a). Respondents, by way of certifications, enlarged the record to include the following:

- a. That they only learned of the judgment of foreclosure on December 22, 1983.
- b. Although the address on the tax assessor's rolls was stale, the attorney conducting the tax foreclosure for petitioner should have known that respondent's law office address had been changed.
- c. Respondents only learned of the judgment of foreclosure in December of 1983, when, having decided to pay their arrearages, they inquired of the tax collector as to the total amount due, at which time they were informed that the properties were foreclosed the previous February.

Respondents conceded that petitioner had complied with the notice provisions of both the In Rem Foreclosure Statute, N.J.S.A. § 54:5-104.29 *et seq.*, and Rule 4:64-7 of the New Jersey Rules of Court. Respondents' argument was that compliance with the cited statute and court rule did not ensure compliance with the constitutional requirements of due process. Citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1949), the trial court stated that due process demands only "notice reasonably calculated, under all the circumstances, to apprise interest parties of the pendency of the action and afford them the opportunity to present their objections." *Id.* at 314. Further, the trial court held that notice of the tax foreclosure action mailed to the address provided by the respondents and listed on the tax rolls meets both the state and federal constitutional due process requirements (Appendix E, 34a). *Township of Montville v. Block 69, Lot 10*, 74 N.J. 1 (1977). Respondents, relying on *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 103 S. Ct. 2706, 75 L. Ed. 2d 180 (1983), argued that petitioner failed to meet due process notice requirements in that it was petitioner's duty not only to check its records with respect to properties sought to be foreclosed,

but in addition to review outside sources to ascertain a possibly more current address of delinquent taxpayers.

In *Mennonite*, this Court held that mortgagees have a legally protected property interest, and therefore, since they are identified in mortgages which are publicly recorded, "constructive notice by publication must be supplemented by notice mailed to the mortgagee's last known available address, or by personal service." *Mennonite, supra*, 75 L. Ed. 2d at 187, 103 S. Ct. at 2711. The trial court here distinguished the facts of *Mennonite* from the case before it and recognized that mortgagees, unlike owners, are less likely to be aware that the property in which they have an interest may be sold for delinquent taxes. The court ruled, however, that with respect to both owners and mortgagees, the Constitution required that notice of such proceedings be mailed to the last known address available for such interested parties as disclosed on public record (Appendix E, 36a). The trial court found that respondent's due process rights had been protected in this case since the petitioner municipality had followed the notice requirements of the statute and the rules of court. The court stated that respondents' due process rights "will not be furthered by punishing (petitioner) for not having taken greater steps to notify owners of property on which the taxes are in arrears." (Appendix E, 38a). The trial court therefore denied respondents' request for relief from the judgment of foreclosure by order dated September 5, 1985, and respondents appealed to the Superior Court of New Jersey, Appellate Division.

In the appeal, respondents again argued that they were denied due process of law under the State and Federal Constitutions. They claimed that the officials who conducted the foreclosure suit on behalf of petitioners were aware of the respondent's change of address but failed to take the necessary steps to notify respondents of the suit. The Appellate Division recognized what this Court stated in *Mullane*; that "impractical and extended

searches are not required in the name of due process," 339 U.S. at 317-318, 70 S. Ct. at 659, 94 L. Ed. at 875 (Appendix D, *infra*, 19a). The Appellate Court held that "Due process does not require tax collectors, municipalities, and their staffs to examine tax rolls and search for outdated or incorrect addresses supplied by property owners to ascertain whether their addresses remain correct." (Appendix D, *infra*, 20a).

Having enunciated that petitioner had no duty to investigate respondent's address on the tax roll, the appellate court nevertheless remanded the case for a hearing as to whether someone involved in the foreclosure proceeding "ignored conscious awareness that the address was outdated or that the mailing was returned and that (respondents) were available for service." (Appendix D, 22a). At the remand hearing held on August 6, 1985, the trial court heard testimony of petitioner's counsel responsible for the foreclosure action, the outside secretary who was retained to prepare the pleadings, and the individual who performed the pre-foreclosure title search for petitioner.

At the conclusion of the testimony, the trial court noted that the burden is on the taxpayer to keep the address of the tax rolls current. The court then addressed the narrow issue before it, namely, whether the parties actually handling the preparation and prosecution of the foreclosure suit had actually recognized before default judgment from any information, including the return of the mailed notice, that the address carried on the tax duplicate for respondents was inaccurate or stale and that, therefore, mailed notice to that address would probably not be delivered and that another known or readily available address could be used to notify them of the foreclosure suit (Appendix C, *infra*, 9a).

The trial court found as a matter of fact that the attorney who actually handled the tax foreclosure had no knowledge or conscious awareness that the address on the tax duplicate was

not the address at which respondents would receive the mail. The court also found that the secretary who was retained to prepare the pleadings for petitioner did not have any actual knowledge that the addresses were improper, nor was she aware that the notices were not properly received. The court recognized that the secretary knew of both of the respondents, yet found that she did not have actual knowledge of their addresses to be able to tell that the addresses on the tax duplicate were not correct. The court's further finding was that the title searcher knew or believed that the addresses on the deeds were incorrect. However, the title searcher was deemed to be an independent contractor and his knowledge, if any, was not imputed to petitioner. On those findings, the trial court affirmed its previous decision. Respondents again filed for an appeal.

The issue raised on appeal was limited to the correctness of the trial court's ruling on remand. Respondent's contention was that they were denied due process in the foreclosure action claiming that the notice of the proceeding was not reasonably calculated to apprise them of the pendency of the proceeding. It was respondent's position that, despite contrary findings by the trial court on remand, petitioner or someone on its behalf had a conscious awareness that if respondent's address on the tax rolls was stale or incorrect, there was a readily available address at which respondents could be served. The Appellate Division reversed the trial court's findings and held that knowledge of the secretary-independent contractor constituted "conscious awareness" that respondents were available at another address for service of notice (Appendix B, *infra*, 7a). It thus concluded that constitutional due process had been violated.

REASONS FOR GRANTING THE WRIT

This case raises significant issues concerning the extent of due process requirements in *in rem* tax foreclosure actions. In

the present case, the Superior Court of New Jersey, Appellate Division, has devised the nebulous and troubling criteria of "conscious awareness" as a new element in the test for constitutional due process. This ruling by the Appellate Division imposes a burden upon a governmental body to undertake extraordinary efforts to discover the whereabouts of delinquent taxpayers, and is inconsistent with decisions of this Court and the lower courts concerning notice and the due process requirements of the Constitution. Further, this ruling will result in unequal protection under the law and will deprive governmental entities of the due process to which they also have a legitimate claim. The result is an improper shifting of the taxpaying burden of property ownership from the property owners who enjoy its benefit to the governmental bodies which already have borne the burden of providing the municipal services which ensure those benefits. For these reasons, review of the decision below is essential.

In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 850 (1950), this Court set forth the standard for notice required in order to satisfy due process requirements. Life, liberty, and property are protected by the due process clause of the 5th and 14th Amendments to the Constitution. Consequently, this Court ruled that before a state could take action which would affect an interest in life, liberty, or property, the state must provide notice "reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections," *Id.* at 314, *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 103 S. Ct. 2706, 2709. *Mullane* struck down a New York statute which allowed accounting of trust funds upon publication notice to the fund's beneficiaries. The statute was struck down as depriving beneficiaries of property without due process, especially where the names and addresses of the beneficiaries were available to the bank.

The issue of due process in the context of foreclosure proceedings has been carefully considered by this Court in *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 103 S. Ct. 2706, 77 L. Ed. 2d 180 (1983) which concerned the type of notice which was due to a mortgagee in a foreclosure action. In *Mennonite*, the property owner was mailed notice of the foreclosure action but the mortgagee was not. However, notice of the proceeding was published. This Court held that since a mortgagee has a legally protected property interest and where "the mortgagee is identified in a mortgage that is publicly recorded, constructive notice by publication must be supplemented by notice mailed to the mortgagee's last known available address, or by personal service," *Id.*, 103 S. Ct. at 2711. The holding was clarified when this Court stated that it did not suggest that the governmental body was required to undertake extraordinary efforts to discover the identity and whereabouts of mortgagees whose identity was not in the public record, *Id.* at footnote 4.

The *Mennonite* ruling was applied by the Federal Court in, *Harris v. Gaul*, 572 F. Supp. 1554 (N.D. Ohio, 1983) which involved foreclosure proceedings against property subject to a land sale contract which provided that sellers would pay the property taxes. The contract was recorded in 1969 but no real estate taxes were paid after 1970. Notice of the tax delinquency was published in the newspaper but no notice was sent to the premises because the tax mailing list contained no address for either the buyer or the seller. Judgment of foreclosure was entered in July of 1979. That court held that a vendee under a land contract has a property interest equally substantial to that of the mortgagee in *Mennonite*; "she clearly merited at least the protection accorded to the mortgagee," in *Mennonite Board of Missions, Harris v. Gaul*, 572 F. Supp. at 1560. Notice by publication was insufficient to provide the vendee with such notice as due process would require, especially when her interest appeared of public record. (See also, *Cooper v. Makela*, 629 F. Supp. 658, (W.D.N.Y. 1986) where

the United States had a clearly identifiable lien in the property foreclosed upon yet was not provided notice of the proceedings, foreclosure was constitutionally defective.)

Clearly these cases indicate that due process requires that a party whose property interest is at stake must be given such notice as, under the circumstances, is reasonably calculated to apprise the party of the pendency of the action and afford them an opportunity to appear in the proceeding. This was the standard applied in the foregoing cases to determine whether the statutes there in question fulfilled the due process notice requirements. There was no question raised by the respondents in this matter that the notice provisions of the New Jersey In Rem Tax Foreclosure Statute are unconstitutional as depriving them of property without due process of law. Service by registered or certified mail, return receipt requested, to the owner at his last known address as it appears on the last municipal tax duplicate meets constitutional requirements. Respondent property owners argued, however, that they were entitled to even greater efforts at notice because they enjoyed some prominence in the community to the extent that if anyone involved in the foreclosure process on behalf of the town knew of their whereabouts, the statutory notice alone would be constitutionally defective. The Appellate Division embraced this brand of logic and held that if anyone had a "conscious awareness" that the address on the tax duplicate for the two owners, one a prominent local attorney, the other a prominent local real estate businessman, was inaccurate or stale and that they would therefore not likely receive mailed notice, and further that there was another readily available address, due process was not met by notice sent to the address on the tax duplicate. The "conscious awareness" criterion is inconsistent with decisions of this Court and lower federal courts.

The cases cited above all dealt with notice requirements to persons who were not listed on the tax rolls. Rather, they were

persons who had a substantial interest in property (mortgagees in *Mennonite, supra*, and *Cooper, supra*; purchasers under a recorded land contract in *Harris v. Gaul, supra*), but were not statutorily required to be given notice of the pending actions. In those cases, the courts ruled that they were entitled to notice of the pending actions, especially where their identities and whereabouts, and their interest in the property in question, were evident on the public record. The mortgagees and vendee under a land contract both had recorded their interest in the public record. They had done all they reasonably could to make their interest publicly known and to protect it. As such, the courts imposed duty on the foreclosing authorities to provide such parties with notice of the action. That same duty cannot be imposed on foreclosing authorities where the owners have taken no reasonable steps to protect their interest in the property, as had occurred in the present case. The owners in this case, a local attorney and a local businessman, had failed and neglected to pay taxes on the property in question from the second half of 1979 to 1982, at which time the foreclosure action was instituted. Then, when they changed their mailing address, they failed and neglected to notify the tax office of the change. Almost one year after default judgment was entered, they telephoned the tax office to determine what the arrearages were, thus proving an ongoing awareness by them of their delinquency. (There was additional evidence that a tax search on the properties was ordered by the respondent-owners in 1980, which also revealed arrearages.)

These respondents ought not now be heard to claim that they are entitled to the same type of efforts at notice that innocent mortgagees and vendees, who would not be aware of tax arrearages on the properties in which they hold an interest, are constitutionally entitled.

The owners in this case disregarded their obligation to pay taxes on the property and to keep their address on the tax rolls

current. Through the tax search in 1980 they were made aware of the tax deficiency but had taken no action to meet their obligation. This failure on the part of the property owners should not impose an additional burden on the foreclosing authorities to determine the present whereabouts of delinquent property owners. In *Mullane*, this Court stated that impractical and extended searches are not required in the name of due process, 339 U.S. at 317-318, 70 S. Ct. at 659, 94 L. Ed. at 875. Thirty-three years later, in *Mennonite*, this Court stated that with respect to due process, a governmental body is not "required to undertake extraordinary efforts to discover the identity and whereabouts of a mortgagee whose identity is not in the public record." 462 U.S. 791, 103 S. Ct. 2706 at 2711, 77 L. Ed. 2d 180.

To permit the ruling of the Appellate Division of the Superior Court of New Jersey to stand in this matter would be contrary to what this Court stated in *Mullane, supra*, and *Mennonite, supra*. It would not only require "impractical and extended searches," but would also require extraordinary efforts to discover the whereabouts of property owners who fail and neglect to meet their obligation to pay taxes. Each judgment of in rem tax foreclosure would require the foreclosing governmental authority to demonstrate that for *each* parcel of property foreclosed upon, no one involved in the preparation or prosecution of the foreclosure for the governmental authority was "consciously aware" that the address on the tax rolls was outdated and that the taxpayer could somehow be located for service. Such a requirement would have the contrary effect of depriving the municipality of the right to due process. Further, the criteria of "conscious awareness" is vague and therefore inapplicable for constitutional determinations.

If the ruling below were sustained, a property owner would be effectively relieved of his obligation to keep his taxes current and to keep his address on the tax rolls up to date. The result

would be what occurred here. For years a property owner deliberately neglects to pay his taxes, changes his mailing address without notifying the taxing office, and thereafter, if sufficiently well known in the community, claims that a judgment of foreclosure against him for tax delinquencies is unconstitutional. This would make a mockery of this Court's prior rulings regarding due process in foreclosure actions and notice which must be given to persons who have an interest in the property (mortgagees, vendees) but have no knowledge of tax deficiencies thereon. Pity on the poor widow or elderly property owner who has been unable to afford to pay the taxes but who does not have the name recognition conferred by position or wealth.

The "conscious awareness" element with respect to due process notice requirements is not only too vague to be constitutionally applicable; it will also result in unequal protection under the laws.

In the case now under consideration, two delinquent taxpayers, through the Appellate Court, have successfully set aside a tax foreclosure on the ground that someone preparing or prosecuting the foreclosure was "consciously aware" that the taxpayers' address on the tax roll was stale and that the taxpayers had another address available for service. One taxpayer was a local attorney, the other a local businessman and real estate entrepreneur. How fortunate for these two taxpayers that, although they haven't paid their taxes for years and although they haven't provided the tax office with a current mailing address, an individual preparing or prosecuting the foreclosure was, or should have been, "consciously aware" of their "presence in the area and their availability for service." (Appendix B, 7a). The attorney for the township had professional dealings on other matters with both taxpayers, even though he didn't know they were defendants in the foreclosure action, while the outside secretary who prepared the pleadings was aware that one of the

taxpayers was a practicing attorney and the other was in real estate, and that both maintained offices in the area. According to the ruling below, this knowledge constituted "conscious awareness" that process could be sent to these two taxpayers at an address other than that listed on the tax roll. Thus, the court ruled that respondents were denied due process in the foreclosure action.

There was no indication given by the court below, however, as to how "conscious awareness" will provide due process to delinquent taxpayers who are not fortunate enough to have professional dealings with the foreclosing attorney or who are not otherwise locally prominent. The fact of the matter is that the "conscious awareness" criteria will result in unequal protection under the law. Foreclosing authorities should be consciously aware that a prominent local attorney and a local businessman maintain an office where he receives mail. However, the same authorities will not be consciously aware that any of its resident taxpayers will be available for service at an address other than that listed in the tax rolls. Both the prominent and not so prominent taxpayers have a real interest in property and are entitled to notice of foreclosure proceedings in order to be afforded due process. However, when both the prominent and not so prominent taxpayers fail to pay their taxes and fail to provide the tax office with their current mailing address, is the prominent landowner entitled to greater protection than the not-so-prominent taxpayer? The answer must surely be no. However, the lower court's holding in this matter would produce precisely this result. *All property owners* who neglect to keep their taxes current and who fail to keep their addresses on the tax rolls current should be given the same protection under the law. The criterion of "conscious awareness" as devised under the New Jersey court is not subject to exact definition. It will clearly result in unequal protection since it defines the scope of the obligation to give notice as being dependent upon the fortuitousness of the property owner's local prominence or dealings with those who may be preparing or

prosecuting the foreclosure. Due process and equal protection afforded by the Constitution cannot be hostage to such uncertain considerations.

The "conscious awareness" element with respect to due process notice requirements in the present matter deprives the foreclosing township and its taxpaying residents of due process.

In rem tax foreclosure is a method by which municipalities can expeditiously get property of delinquent taxpayers back on the tax roll. The property owner is entitled to notice of the proceeding. The due process notice requirement is met when the foreclosing authority sends notice, by registered or certified mail, to the owner at his last known address as it appears on the tax duplicate. That requirement was met in this case. However, the court below has invented a new requirement, that of "conscious awareness" in notice requirements in foreclosure proceedings. The result of such a requirement is manifold, including depriving the township and its taxpaying residents of property without due process of law.

In all in rem foreclosure actions, the foreclosing authority will have to show that it was not "consciously aware" of any other place at which a non-answering delinquent taxpayer may be served. The court below was silent on the nature of the inquiry now required. Should it be a telephone book inquiry? If so, which book? Should it be a motor vehicle lookup? Should ads be placed on radio, television, and in foreign publications? The possible scope of inquiry is limited only by the inventiveness of the New Jersey courts. Township funds, in the form of taxes collected from nondelinquent taxpayers, will have to be expended for that purpose. Thus, responsible taxpaying residents must bear the cost when delinquent taxpayers neglect to keep their address on the tax rolls current and then seek to set aside a foreclosure on the ground that someone foreclosing was "consciously aware" that the address on the tax rolls was stale.

In addition, and what has happened below, taxpayers purposely neglect paying their taxes until the last moment, which may go on for years. There is nothing illegal about such conduct—taxpayers may get better use of their money during the same period and then pay the taxes at a later date. They also know that they risk foreclosure by doing so. However, as here, the taxpayers changed their mailing address and failed to notify the tax office of the change. The taxes were unpaid for 3½ years and foreclosure proceedings were commenced. Taxpayers, through their own fault, did not receive the notice mailed to the address on the tax rolls. The township, entitled and mandated to collect taxes for the property, foreclosed for the delinquent taxes.

Under the ruling here sought to be reviewed, it is the taxpayers who are current on their taxes who are deprived of their property, in the form of tax funds, without due process of law each time such a delinquent taxpayer who fails to keep his address on the tax rolls challenges a foreclosure on due process grounds. This unwarranted extension of the doctrine of due process by the New Jersey courts cannot be allowed to go unchallenged and uncorrected.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES E. STARKEY
STARKEY, KELLY, BLANEY &
WHITE
Attorneys for Petitioner

**APPENDIX A—ORDER DENYING PETITION FOR
CERTIFICATION DATED DECEMBER 22, 1986**

SUPREME COURT OF NEW JERSEY

C-146 SEPTEMBER TERM 1986

25,857

TOWNSHIP OF BRICK, etc., et al.,

Plaintiffs-Petitioners,

vs.

BLOCK 48-7, LOTS 34, 35, 36, KENLAV, etc.,

Defendants,

and

ROBERT V. PASCHON, et al.,

Defendants-Respondents.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-283-85T1 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

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WITNESS, the Honorable Robert L. Clifford, Presiding Justice,
at Trenton, this 22nd day of December, 1986.

s/ Stephen W. Townsend
CLERK OF THE SUPREME
COURT

APPENDIX B—OPINION OF SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, DATED MAY 30, 1986

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION**

A-283-85T1

TOWNSHIP OF BRICK, a municipal corporation of the County of Ocean and State of New Jersey,

Plaintiff-Respondent,

v.

BLOCK 48-7, LOTS 34, 35, 36, Kenlav, c/o Party Time Inn, and other lands,

Defendants,

and

ROBERT V. PASCHON and BYRON KOTZAS,

Defendants-Appellants.

Argued May 19, 1986 - Decided May 30, 1986

Before Judges Cohen and Skillman.

On appeal from the Superior Court, Chancery Division, Ocean County.

Frederic K. Becker argued the cause for appellants (Wilentz, Goldman & Spitzer, attorneys).

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Charles E. Starkey argued the cause for respondent
(Starkey, Kelly, Blaney & White, attorneys).

The opinion of the court was delivered by

COHEN, J.A.D.

The background of this case was explored in our previous opinion, which appears at 202 *N.J. Super.* 246 (App. Div. 1985), and will not be repeated here. In remanding the case to the Chancery Division for further hearing, we stated:

Relief from the judgment should be granted only if anyone actively involved for plaintiff in the preparation and prosecution of the foreclosure suit had actually recognized before the default judgment from any information, including the return of the mailed notice, that the address carried on the tax duplicate for Paschon and Kotzas was inaccurate or stale and that, therefore, notice mailed to that address would probably not be delivered, and that another, known or readily available address could be used to notify them of the foreclosure suit. [202 *N.J. Super.* at 254].

The hearing was not lengthy. Counsel who was responsible for the prosecution of the foreclosure suit (not counsel before this court) testified and professed very little knowledge of the matter. He retained a Mrs. Foley, an experienced person, not employed by his law office, who had done foreclosures for some 15 years for various lawyers. She prepared all of the pleadings in her home and, generally, took responsibility for the matter. Counsel reviewed documents only for legal sufficiency and signed

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them. He executed an affidavit of service although it was Mrs. Foley who actually mailed the process, and he did not know to whom process was mailed. Even though he did not know who the assessed owners were, he executed an affidavit of non-military service. He did not examine the returned undelivered envelopes in which process was mailed.

Although counsel knew Robert Paschon and Byron Kotzas rather well, he did not know they were two of the assessed owners involved in the suit. He had dealt with Paschon and his law firm for many years; he knew Paschon's office was in Toms River and that he regularly received mail there. Counsel had professional dealings with Kotzas both before and after the foreclosure. His law partner was an investment partner of Kotzas. Counsel undoubtedly knew, at the time of the foreclosure, where Kotzas could be reached.

Mrs. Foley, who actually performed the work in the foreclosure case, was an investigator with the Board of Elections. On a part-time basis, she did tax foreclosures and other specialty work for various law firms. Mrs. Foley knew of Robert Paschon as an attorney practicing law in the area and knew that he maintained a local office for that purpose. She assumed he received mail there. She was also aware of Byron Kotzas; that he was a principal of Crossroads Realty and maintained a real estate office in the area. She assumed he received mail there. Mrs. Foley typed Paschon and Kotzas's names in the pleadings, including the information that their mailed process had been returned undelivered. She understood the meaning of the words "forwarding order expired" which appeared on the envelopes returned by the post office.

Mrs. Foley testified that she did not recall if, when the

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Paschon and Kotzas envelopes were returned, it occurred to her that they had been misaddressed or else they would have been delivered. She took no further action to cause notice to be sent to them.

There was testimony, then, from two persons actively involved for plaintiff in the preparation and prosecution of the foreclosure suit. One of them, plaintiff's counsel, was very familiar with Paschon and Kotzas, but his contact with the foreclosure suit was so minimal that he was unaware even that they were parties to the suit. The other person, Mrs. Foley, had knowledge that notices mailed to the addresses furnished for Paschon and Kotzas were undeliverable because, according to the post office, they had moved and the order to forward mail to a new address had expired. Plainly, therefore, she knew that the address used for service was stale. At the same time, Mrs. Foley independently knew that Paschon and Kotzas maintained professional offices in the area, and she assumed they received mail there. Mrs. Foley did not recall if she actually came to the conclusion which the facts before her compelled: that process could be sent to Paschon and Kotzas at current addresses which could readily be found.

Our prior opinion did not envision the fragmentation of function and responsibility existing among the persons prosecuting the foreclosure suit. We assumed that all material information eventually came to an ultimately responsible person whose conscious awareness could then be examined. That, however, does not appear to be the case. Rather, the separation of function effectively compartmentalized available knowledge as well.

Although plaintiff had no responsibility to seek out taxpayers in its foreclosure suit to see if they had furnished up-to-date addresses, *Atlantic City v. Block C-11, Lot 11*, 74 N.J. 34 (1977),

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and although local professional prominence does not call for preferential treatment from plaintiff, it is yet another thing for those involved in prosecuting a suit to deal with available information in such a way as to render it useless.

Counsel and Mrs. Foley were both consciously aware of defendants' presence in the area and their ready availability for service. Counsel did not consciously link that information with the non-delivery of mailed process because he insulated himself from knowledge of facts involved in the suit, otherwise counsel would have become aware of the obvious facts before him. Mrs. Foley, who actually handled the suit, had before her the returned service marked "forwarding order expired." Although she did not recall her reaction, the information was plainly and simultaneously before her both that defendants' address was outdated and that defendants had readily available addresses where they could be reached. Because Mrs. Foley actually recognized the existence of all of that information, it is no matter that she does not recall if she recognized it all at the same instant. In those circumstances, the proofs satisfied the standard established in our earlier opinion.

We reverse and remand to the Chancery Division for further proceedings designed to afford Paschon and Kotzas a reasonable time to pay to plaintiff all taxes involved in the foreclosure suit, all interest to date, and all costs incurred by plaintiff in the prosecution of the suit against them through the filing of the judgment. Any disputes as to amount to be paid shall be resolved in the Chancery Division. Upon full payment within the time set, the judgment of foreclosure shall be vacated by the Chancery Division. Upon expiration of the time set without full payment, defendants shall lose the right to any relief from the judgment.

**APPENDIX C—TRANSCRIPT OF TRIAL COURT FINDINGS
ON REMAND HEARING DATED AUGUST 6, 1985**

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION : OCEAN COUNTY
Docket No. F-146-82

TOWNSHIP OF BRICK, a municipal corporation of the County
of Ocean and State of New Jersey,

Plaintiff,

vs.

BLOCK 48-7, LOTS 34, 35, 36 KENLAV, c/o Party Time Inn,
and other lands, and ROBERT V. PASCHON AND BYRON
KOTZAS,

Defendants.

**STENOGRAPHIC TRANSCRIPT OF COURT'S FINDING ON
REMAND HEARING**

Place:

Ocean County Courthouse
Toms River, N.J.

Date:

August 6, 1985

BEFORE:

THE HONORABLE HENRY H. WILEY, J.S.C.

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[93] THE COURT: This is a matter that's been referred back to the trial Court for a limited issue. The Appellate Division on page 10 says that the trial Court should hear additional testimony, whether the parties who were actually handling the preparation and prosecution of the foreclosure suit had actually recognized before default judgment from any information, including the return of the mailed notice, that the address carried on the tax duplicate for Paschon and Kotzas was inaccurate or stale and that, therefore, notice mailed to that address would probably not be delivered and that another known or readily available address could be used to notify them for the foreclosure suit.

Now, the party that actually handled the tax sale certificate foreclosure was a Joseph Foster who was an attorney at law of the State of New Jersey. He has testified, and was called by the defendant, that he had no actual knowledge or conscious awareness that the address on the tax duplicate was not the address at which the defendants, Paschon and Kotzas, would receive the mail.

My evaluation of these cases dealing with an *in rem* tax sale certificate foreclosure is that the burden is on the taxpayer to keep his address current. The statute, New Jersey Statutes Annotated 54:5-104.31, states, "This act shall [94] be liberally construed as remedial legislation to encourage the barring of rights of redemption and is an alternate and additional remedy to any other remedy provided by law and shall apply to the certificates

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of tax sales heretofore or hereafter issued and held by a municipality." This is not an in personam tax sale certificate foreclosure. Mr. Solakian indicated that if you have an in personam tax sale certificate foreclosure or a search in that regard, you have a much heavier burden to search out who the owners are and make a detailed search as to the addresses and the persons involved, but not in the case of an in rem tax sale certificate foreclosure.

In this case some twenty-four letters came back after they were sent out. The various letters had many indications on them why they weren't received. For instance, and I'm reading from DS-1 in evidence, the letters had such information as "Attempted, not known, no such number."

Another one had on it, the letter there was returned, "Not deliverable as addressed; unable to forward."

Another had on it, "Return to sender, moved; left no address."

Another had on it, "Moved, not forwardable; address unknown."

And you can go through these various letters and see these various indications that the post office put on [95] these addresses. In my opinion the defendants here have added or attempted to add an additional requirement and, that is, that

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the tax assessor and the party doing the foreclosure has to search out whether the addresses are correct on the tax duplicate and the addresses to which the notices were sent were correct and actually could be received by the property owners.

That is not the law. That's not the law under any of the cases that have been referred to, and I don't find here that Mr. Foster had any actual knowledge that the addresses were improper or not received or was aware that they weren't properly received, nor did Mrs. Lucille Foley who was the secretary. She knew of Mr. Kotzas, but she may have known any of the hundred people on this list. I don't think if your going to have an in rem tax sale certificate foreclosure that you can pick out an individual that you happen to know of and then put a duty on the person preparing the in rem tax sale certificate foreclosure to be sure that he received the notice.

That's really what is being suggested here, and in my opinion that's not the law, and I don't find the defendants have met the burden of proof according to the standard set in the Appellate Division's remand here. I don't find that Miss Foley had actual knowledge of the addresses of Kotzas or Paschon to be able to tell that the [96] addresses on the tax duplicate were incorrect.

Mr. Foster wasn't aware they were on it. Mr. Solakian, I think, indicates that he referred to the addresses on deeds that he searched, and he found

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those people different from the addresses that he believed to be the correct address.

I think Mr. Solakian, of course, is really an independent contractor. He's not the one who is preparing or prosecuting the foreclosure. He submitted an affidavit to the Township to do an *in rem* tax sale certificate search.

Mr. Iacobino, I think it is, the tax collector, assessor, approved his estimate. Then he made the search and returned it; that's all he did. He wasn't actually recognized or actually involved, or preparing the prosecution. In any event, what he knew he didn't pass onto anybody. He didn't tell Mr. Foster that or he didn't bring it to the attention of Mrs. Foley, either.

So I think the standards set on page 10 of the Appellate Division's opinion have not been met, that there was no actual knowledge by Mr. Foster or Mrs. Foley that these addresses were incorrect and the other requirements required there or that they actively, or they were consciously aware that the addresses were outdated or that the mailing was returned or that Paschon and Kotzas were available for service.

[97] I think that it's a two-way street here. There's an obligation on the party to keep the municipality aware of the proper tax address. There was nothing the matter with the notice given. It was given to the person who appeared on the tax

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duplicate. The problem was with the defendants. They, one, failed to keep the address on the tax duplicate current; and, two, they failed to notice the post office to renew their forwarding address. So these were the mistakes that were made, and I don't see that the municipality has failed to live up to the standards of an *in rem* tax sale certificate foreclosure.

So I will affirm my previous decision, and I'd ask Mr. Starkey to prepare the form of the order, submits it to Mr. Becker under our five-day rule and back to the Court.

I'd ask each one be or hold your own exhibits, so that on the appeal you'll be responsible for taking care of those exhibits. Thank you.

MR. STARKEY: Thank you.

MR. BECKER: Thank you, Judge Wiley.

**APPENDIX D—OPINION OF SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, DATED JUNE 19, 1985
REPORTED AT 202 N.J. SUPER. 246**

TOWNSHIP OF BRICK, A MUNICIPAL CORPORATION OF THE COUNTY OF OCEAN AND STATE OF NEW JERSEY, PLAINTIFF-RESPONDENT, v. BLOCK 48-7, LOTS 34, 35, 36 KENLAV C/O PARTY TIME INN, AND OTHER LANDS, DEFENDANTS, v. ROBERT V. PASCHON AND BYRON KOTZAS, DEFENDANTS-APPELLANTS.

**Superior Court of New Jersey
Appellate Division**

Argued April 2, 1985—Decided June 19, 1985

Before Judges PRESSLER, BRODY and COHEN.

Frederic K. Becker, argued the cause for appellants (*Wilentz, Goldman & Spitzer*, attorneys).

Charles E. Starkey, argued the cause for respondent (*Starkey, Kelly, Blaney & White*, attorneys).

The opinion of the court was delivered by

RICHARD S. COHEN, J.A.D.

This is an *in rem* tax foreclosure suit by plaintiff Township of Brick against vacant property assessed to Robert V. Paschon, a local attorney, and Byron Kotzas, a local real estate entrepreneur. Plaintiff served the foreclosure complaint in the manner required by *N.J.S.A. 54:5-104.42* and *R. 4:64-7*, by publication, posting in the office of the tax collector and three other conspicuous places in the municipality, and mailing by certified or registered mail to the owners at their "last known address as it appears on the

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last municipal tax duplicate." *R.* 4:64-7(c).¹ Their address appeared on the municipal tax duplicate as 1277 Hooper Avenue, Toms River, the former location of Paschon's law office.

Before the foreclosure complaint was filed and a copy mailed to his law office, Paschon moved his office from 1277 Hooper Avenue, Toms River, to 1005 Hooper Avenue, Toms River. He did not, however, take steps to correct the address on the tax duplicate. The mailed complaint was not forwarded by the postal authorities, but was returned with a stamp on the envelope which said:

Returned to Sender

Unable to forward

Undeliverable as addressed

Forwarding order expired

Plaintiff took no further steps to serve the complaint on Paschon and Kotzas after the mailed notice was returned. It ultimately sought and obtained a default judgment. Almost a year later, Paschon and Kotzas moved to be relieved from the judgment. *R.* 4:50-1. The application was denied, and they appealed. Their new counsel moved before this court to supplement the record. We denied the motion, but remanded to permit the motion to be made in the trial court and retained jurisdiction. The motion was granted there, and the record was thus enlarged. The court reconsidered the merits on the basis of the enlarged record and

1. Personal service in the manner provided by *R.* 4:4-4(a) is a permitted alternative to mailing. *R.* 4:64-7(c).

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again denied relief. The matter has been returned to this court. Plaintiff has not cross-appealed from the trial court's determination to permit enlargement of the record. We now reverse and remand to the trial court.

At one time, *in rem* tax foreclosure suits could proceed with notice to property owners limited to publication and posting. *Newark v. Yeskel*, 5 N.J. 313 (1950). In 1950, the United States Supreme Court decided *Mullane v. Central Hanover B. & T. Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865. It held constitutionally insufficient giving notice to beneficiaries solely by publication of a trustee's settlement of accounts. The Court said:

. . . process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. 339 U.S. at 314-315, 70 S.Ct. at 657.

In *Newark v. Yeskel*, *supra*, New Jersey's Supreme Court held *Mullane* inapplicable to *in rem* tax foreclosure proceedings. But, then came *New York v. New York, N.H. & H.R. Co.*, 344 U.S. 293, 73 S.Ct. 299, 97 L.Ed. 333 (1953), holding insufficient the giving of notice to known creditors by publication of a bankruptcy reorganization; *Nelson v. New York*, 352 U.S. 103, 77 S.Ct. 195, 1 L.Ed.2d 171 (1956), in which mailed notice was assumed necessary in a tax foreclosure proceeding; and *Schroeder v. New York*, 371 U.S. 208, 83 S.Ct. 279, 9 L.Ed.2d 255 (1962), holding that publication and posting did not give sufficient notice to owners in a condemnation proceeding. The expanding application of *Mullane* convinced the New Jersey Supreme Court that *Newark v. Yeskel* had been incorrectly decided. In *Township of Montville v. Block 69, Lot 10*, 74 N.J. 1 (1977), it held that an owner's

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right of redemption could not be validly cut off by a tax foreclosure suit unless personal service or mailed notice were added to the statutory requirements of publication and posting. *R.* 4:64-7 and *N.J.S.A.* 54:5-104.42 were later amended to accommodate the *Montville* decision.

There is no question but that plaintiff satisfied the *Montville* requirement of mailing notice. It is argued, however, that Paschon and Kotzas were nevertheless denied due process of law. They submit that the local officials who conducted the foreclosure suit knew of their change of address, knew where they could be reached and yet failed to take the simple steps necessary to give them notice of the suit.

Detailed recital of the proofs before the trial court is unnecessary. Suffice it to say that there was evidence that plaintiff's counsel handled this matter in a routine fashion and did not give it special attention, even after the return of the mailed notice. The foreclosure complaint involved approximately 100 parcels of property. The caption is seven pages long. Plaintiff's counsel explained in an affidavit that his firm customarily deals with tax foreclosures in groups of 100 parcels. The pleadings, publications and mailings are handled by a secretary who acts under general instructions from counsel. All pleadings are reviewed by counsel for legal form. He did not know, however,

that the address to which notice was sent to Mesrs. Paschon and Kotzas was incorrect. [He] did not periodically examine any of the envelopes which were returned as not being deliverable.

Counsel's affidavit of service shows that he mailed notice both by certified and ordinary mail. Seventy-three notices were sent

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by certified mail to owners at twenty-three different post offices. Forty-nine were received by the addressees. Twenty-four, including the one sent to Paschon and Kotzas, were returned. The affidavit does not say whether any of the notices mailed by regular mail were returned.

There was evidence before the trial court that information was available in the Lawyer's Diary and Manual or the telephone book to ascertain where Paschon and Kotzas could have been found,² that counsel's office had communicated with Paschon by mail at his new office address in a recent unrelated legal matter and that Paschon had previously written to the plaintiff's tax office on stationery that bore his new address. There was a disputed allegation that, before the foreclosure suit, plaintiff's counsel had represented Kotzas in an unrelated matter.

On the other hand, there was evidence that Paschon and Kotzas paid taxes on this property only when no other option remained. In 1979, they redeemed tax sale certificates generated by their failure to pay 1975, 1976, 1977 and 1978 taxes. The present foreclosure suit arose out of their failure to pay for 1979 (second half), 1980, 1981 and 1982. They had ordered tax searches in 1980 on two of the three lots. At the time of foreclosure, the amount required to redeem was some \$54,000.

There is nothing illegal about the means Paschon and Kotzas chose to deal with their property taxes. But, they knew or should have known that their change of address would eventually cut off transmittal of tax bills and related notices. In 1982, they should have been alerted either by receiving forwarded tax bills addressed

2. The 1982 Lawyer's Diary and Manual lists Paschon's office address as 1005 Hooper Avenue. The 1981 edition had it as 1277.

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to the former location or by not receiving tax bills at all. After September 1982, when service by mail was attempted, and December 1983, when they made their motion for relief, they must not have received any tax bill from plaintiff. They should also have recognized that municipal officials do not peruse the tax duplicates to see if people they know have supplied their correct addresses. Moreover, the correctness of owners' addresses is not ascertainable on mere inspection. The addresses may be those of accountants, attorneys, trustees, banks or others entrusted with bill-paying functions. Thus, there is ordinarily no reason why an address given by the owner of vacant land should be the subject of suspicious questioning at the municipal tax offices. Of the twenty-seven notices returned in the present case, fifteen were from post offices outside of Brick Township, five outside of New Jersey. The United States Supreme Court said in *Mullane* that "impractical and extended searches are not required in the name of due process." 339 U.S. at 317-318, 70 S.Ct. at 659, 94 L.Ed. at 875.

Property owners' addresses are supplied to tax assessors, who are not expected to ferret them out. A new owner may present the deed to the assessor. N.J.S.A. 54:4-29. If that is not done, the register of deeds or county clerk must ascertain and mark on the deed the new owner's post office address. N.J.S.A. 54:4-30. The register or county clerk may not record any deed unless the new owner's address appears on it, N.J.S.A. 54:4-32, and must send to the assessor an abstract of the recorded deed containing the address. N.J.S.A. 54:4-31. The names and addresses that result from this process are used for mailing of tax bills and for the tax duplicate. Those are the names and addresses which the municipality employs in serving notice of tax foreclosure suits. R. 4:64-7(c). If an owner wants the address on the tax duplicate changed, it is up to the owner to notify the assessor. If that is

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not done, the tax obligation is unaffected and the owner is dutybound to ascertain the amount owed. *N.J.S.A. 54:4-64.*

Due process does not require tax collectors, municipalities and their staffs to examine the tax rolls to search for outdated or incorrect addresses supplied by property owners, or to communicate with property owners to ascertain whether their addresses remain correct. A local professional or business person can not expect more. It is not controlling that the municipality or counsel may have unrelated communication with the taxpayer at an address different from that appearing on the tax rolls.

The New Jersey Supreme Court has clearly ruled that municipalities are not constitutionally required to search out taxpayers in foreclosure suits to see if they have furnished up-to-date addresses. *Atlantic City v. Block C-11, Lot 11*, 74 N.J. 34 (1977), a companion case to *Montville*, was a tax foreclosure suit involving property bought in 1938 by a corporation owned by Sylvan Schoenthal. The owner was listed as the corporation with its address at the premises. Since 1960, when the principals of the corporation were divorced and the wife, Rose Schoenthal, received the property as part of the divorce proceedings, she dealt with the property as her own. Even though the name and address on the tax duplicate was never changed, she applied for a tax deduction in her own name in the early 1960's and received a refund for a tax overpayment in the same years. In 1972, she obtained a demolition permit and tore down the building on the property. Subsequently, she applied for and received a further tax reduction. She also contended that the city customarily sent two sets of tax bills, one to the corporation at its listed address and the other addressed to her home. The Supreme Court held that, in these circumstances, due process did not require the city to give Mrs. Schoenthal notice of the tax foreclosure suit. Such

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a requirement, reasoned the Court, would go beyond *Mullane* and place on the city the affirmative duty of ascertaining whether the name and address on its tax rolls are correct. Compare *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983) where mortgagees whose liens were publicly recorded but did not appear on the tax rolls were held entitled to personal service or mailed notice. *But see N.J.S.A. 54:5-104.48.*

Paschon and Kotzas question *Atlantic City* on the basis of two United States Supreme Court cases, which we find to be distinguishable. The first is *Robinson v. Hanrahan*, 409 U.S. 38, 93 S.Ct. 30, 34 L.Ed.2d 47 (1972). There, the State took judicial proceedings to forfeit a motor vehicle by reason of its involvement in criminal activity. The statute required notice to the owner to be mailed to the address shown on the vehicle registration. The mailed notice failed to reach the owner because he was in jail awaiting trial on the charges out of which the forfeiture action arose. The Court held that the State could not validly mail notice of the forfeiture to an owner at an address from which it knew he was absent because it was holding him in jail. The present case differs from *Robinson* in the important respect that the failure of the mail to reach Paschon and Kotzas was not due to plaintiff's action but, rather, their own failure to make themselves accessible to mail service.

The other United States Supreme Court case is *Covey v. Somers*, 351 U.S. 141, 76 S.Ct. 724, 100 L.Ed. 1021 (1956). There, mail service was made upon an owner in a tax foreclosure action who the town officials knew was incompetent. Because of the officials' knowledge that such service would be unavailing, the Court held that due process was denied to the incompetent.

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Actual knowledge of facts making receipt of mailed notice unlikely is a matter that was not fully explored in the present case. For that reason, we must remand for a full hearing on that matter. Although plaintiff and its counsel had no duty to investigate Paschon's and Kotzas's address on the tax rolls, either initially or after return of the undelivered mailing, it is something else altogether if someone involved ignored conscious awareness that the address was outdated or that the mailing was returned and that Paschon and Kotzas were available for service.

Relief from the judgment should be granted only if anyone actively involved for plaintiff in the preparation and prosecution of the foreclosure suit had actually recognized before the default judgment from any information, including the return of the mailed notice, that the address carried on the tax duplicate for Paschon and Kotzas was inaccurate or stale and that, therefore, notice mailed to that address would probably not be delivered, and that another, known or readily available address could be used to notify them of the foreclosure suit.

There were insufficient facts before the trial court and, thus, to resolve the issue, there must be a plenary hearing. The burden to proceed and to persuade belongs to the defaulting taxpayers.

The order denying relief from the judgment is reversed and remanded for proceedings consistent herewith. We do not retain jurisdiction.

APPENDIX E—OPINION OF SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION DATED JULY 30, 1984

**SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION—OCEAN COUNTY**

Docket No. F-146-82

TOWNSHIP OF BRICK, a municipal corporation of the County of Ocean and State of New Jersey,

Plaintiff,

vs.

BLOCK 48-7, LOTS 34, 35, 36, KENLAV c/o PARTY TIME INN, and other lands,

Defendants,

and

ROBERT V. PASCHON and BYRON KOTZAS,

Defendants.

Decided: July 30, 1984

Mr. Charles E. Starkey for Plaintiff

Mr. Frederic K. Becker for Defendants Robert V. Paschon and Byron Kotzas

WILEY, J.S.C.

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This case has been remanded from the Appellate Division to permit defendants/appellants to apply to this Court for permission to enlarge the record by including therein the certifications of Robert V. Paschon dated May 9, 1984 and of Ellen Zahn dated May 3, 1984. In the event that this Court grants the motion to enlarge the record, the Appellate Division in its May 31, 1984 order has given defendants leave to move in the trial court for reconsideration of its order dated March 1, 1984 from which defendants sought the appeal.

The procedural history of this case began on September 8, 1982 when the Township of Brick, through its attorney Joseph L. Foster, filed an *In Rem Tax Foreclosure* complaint against, among other defendants, Block 685, Lots 5, 6, and 7 assessed to Robert V. Paschon and Byron Kotzas. The Township faithfully complied with the notice requirements of both *In Rem* Statute, N.J.S.A. 54:5-104.29 et seq., and the Rules of Civil Practice of the Superior Court, specifically Rule 4:64-7. Notice of the foreclosure proceedings was posted on September 24, 1982, published in the Daily Observer on September 23, 1982 and mailed to Robert V. Paschon by certified mail on September 27, 1982 at the address then listed on the Tax Assessor's records.

Michael Iacobino, Brick Township's Tax Collector, certified on February 9, 1983 that he had not received any notice pursuant to N.J.S.A. 54:5-104.48 specifying a title, lien, claim or interest in any of the lands sought to be foreclosed. On the same date, Mr. Iacobino also filed an affidavit stating that Block 685, Lots 5, 6, and 7 had not been redeemed. Defendants Paschon and Kotzas were defaulted on February 9, 1983 and the Clerk of the Superior Court entered the Final Judgment of Foreclosure on the same day.

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Through their attorney, Garrett L. Joest, III, defendants took action with respect to this foreclosure for the first time on January 13, 1984 by filing an Order To Show Cause. Eleven months after the foreclosure judgment was entered, defendants sought to partially vacate that judgment as to Block 685, Lots 5, 6, and 7. Defendants' application was denied on February 2, 1984, the return date of the Order to Show Cause. The Court failed to find any mistake, inadvertence, surprise or excusable neglect to justify vacating the judgment pursuant to Rule 4:50-1(a). There was also no newly discovered evidence which would probably alter the judgment or order and which by due diligence could not have been discovered in time to move for a new trial under Rule 4:49. See Rule 4:50-1(b). The Court found no apparent other reasons for granting relief from the operation of the judgment or order under Rule 4:50-1(f). Thus, the Order To Show Cause was dismissed with prejudice.

The notice of appeal from this Court's February 2, 1984 determination of defendants' Order To Show Cause was filed on March 31, 1984. Defendants sought permission from the Appellate Division to enlarge the record by adding supplemental certifications of Robert V. Paschon and Ellen Zahn. On May 3, 1984 this Court signed an order staying its previous order which denied defendants' motion to vacate the foreclosure judgment. The Appellate Division then remanded the case on May 31, 1984 to allow the trial court to decide whether or not to permit defendants to enlarge the record, as well as a motion for reconsideration of the February 2, 1984 order. The Appellate Court has retained jurisdiction requiring that this Court return the record and this Court's findings to the Appellate Division by August 1, 1984.

To fully understand the factual background of this litigation, it should be noted that real estate taxes on Block 685, Lots 5,

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6, and 7 were in arrears from 1975 through 1978. On June 20, 1979 defendants Paschon and Kotzas redeemed Tax Sale Certificates on these three lots. However, since 1979 the payment history of real estate taxes on the subject property has been very similar to what it was prior to that point. Real estate taxes on Lots 6 and 7 have been in arrears from the second half of 1979 through January 30, 1984. The taxes on Lot 5 also have not been paid. At the time of foreclosure, the amount necessary to redeem Lots 5, 6, and 7 was \$54,000. Currently, these properties have been valued by Richard E. Hall, t/a Richard E. Hall Associates, Inc. at \$810,000.

The Township of Brick sent a notice of this foreclosure proceeding to Mr. Paschon by certified mail at the address then listed on the Tax Assessor's records on September 27, 1982. Said notice was returned because it was undeliverable due to the fact that the forwarding order left by defendants with the U.S. Post Office had expired. Even before this action was instituted, however, defendants were made aware of the tax delinquencies on Lots 5 and 6. At the instance of Mr. Paschon, New Jersey Realty requested a tax search on Lot 6 in May, 1980. A similar tax search was ordered on Lot 5 in July, 1980. Both searches, supplied by the Township, revealed the then already delinquent tax status of these properties.

Defendants assert that they did not learn of the Tax Foreclosure until December 22, 1983. At that time, Mr. Paschon directed the bookkeeper of his law firm, Ellen Zahn, to call the Brick Township Tax Collector's office and ascertain the amount necessary to bring the real property taxes on Block 685, Lots 5, 6, and 7 current. Ms. Zahn was informed at that point that these properties had been foreclosed eleven months earlier. The reason for defendants' sudden interest in the amount of taxes due on

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the subject property was that they had just then decided to pay the tax arrearages on these lots.

In support of their Order To Show Cause to partially vacate the final foreclosure judgment, defendants filed the certification of Brian O'Malley, a law clerk for the law firm of Paschon, Feurey and Kotzas. On January 10, 1984 Mr. O'Malley checked the records of the Brick Township Tax Assessor. He found that in 1979 Block 685, Lots 5, 6, 7, and 8 were listed as owned by Mr. Paschon and Mr. Kotzas with an address of 1027 Hooper Avenue, Toms River. In 1982 the Township Tax Assessor's records reveal a change in the address of the owners to 1277 Hooper Avenue. The following year those records were corrected to show that Lots 5, 6, and 7 were now owned by the Township.

Defendants allege that they never received personal service of notice of the foreclosure action. The Township mailed a notice to the law firm's old address based on its tax records. Defendants claim, however, that the Township was aware at the time it instituted this foreclosure that in fact defendants had a new address. Defendants argue that Mr. Foster, the Township's attorney, knew or should have known that defendants had a new address and that this new address was 1005 Hooper Avenue. This claim is based in part on the fact that with a cover letter dated March 15, 1982 on the letterhead of the law firm of Paschon, Feurey and Kotzas indicating the current 1005 Hooper Avenue address, defendants mailed a check as payment in full of the taxes then due on Lot 8 to the Township. Thus, as to Lot 8, the Township had an indication that the owners of that property could be reached at 1005 Hooper Avenue. However, when the Township began its foreclosure against Lots 5, 6, and 7 six (6) months later, its records showed that the owner's address was 1277 Hooper Avenue.

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Defendants further claim that Mr. Foster obtained knowledge of their new address because he represented defendant Kotzas before the Dover Township Planning Board. However, in his February 3, 1984 certification, Mr. Foster states that he never represented Mr. Kotzas before the Dover Township Planning Board prior to May, 1983. Therefore, any knowledge of defendants' new address which Mr. Foster may have obtained by virtue of his representation of Mr. Kotzas was not obtained prior to September, 1982 when the notice of this foreclosure was mailed. Defendants also claim that Mr. Foster's secretary, Della Goral, was aware of defendants' correct address. Ms. Goral only notarized the signatures on the foreclosure pleadings. She had nothing to do with the sending of the notice of this foreclosure action to defendants. Finally, defendants argue that Mr. Foster knew of their new address by virtue of a settlement agreement negotiated between Brick Township and Mr. Feurey in another case. Mr. Feurey is a partner in defendant Paschon's law firm. Correspondence in this other matter indicated that defendant Paschon's law firm was located at 1005 Hooper Avenue. The case involving Mr. Foster and Mr. Feurey was litigated in 1979. Apparently, Mr. Foster corresponded with Mr. Feurey at the 1005 Hooper Avenue address at that time and was aware of that address as of October 7, 1981.

Finally, defendants claim that the Township could have actually notified them by sending the notice of foreclosure to Crossroads Realty, of which defendant Kotzas is a principal. Apparently, a sign has been posted for some time on the parcels in question offering them for sale through Crossroads Realty. Defendants go so far as to suggest that Mr. Foster, as a fellow attorney, could have readily found Mr. Paschon's new address in the New Jersey Lawyer's Diary or the Ocean County telephone book and that Mr. Foster should have checked these sources to

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determine defendants' correct address.

The Court first considers defendants' motion to enlarge the record by including Mr. Paschon's and Ms. Zahn's certifications which were previously inadvertently omitted and which explained why defendants took no action with respect to the instant foreclosure until eleven months after the final judgment had been entered. Defendants argue that the interests of justice require that they have the opportunity to refute any implication that they knowingly and deliberately delayed applying for relief from the tax foreclosure judgment for a period of eleven months. The Appellate Division should have a complete record upon its review of this matter on the pending appeal. Defendants also propose to supplement the record with the testimony of Mr. Paschon and Ms. Zahn. Thus, plaintiff will have the opportunity to cross-examine the witnesses or otherwise meet defendants newly offered evidence.

Plaintiff takes the position that Rule 2:5-5(a) entitled "Correction or Supplementation of the Record" allows a party to correct the record only if material mistakes appear therein. Since defendants do not allege an error in the record, they are therefore not entitled to "settle the record." The record may be supplemented only with respect to an administrative agency hearing pursuant to R. 2:5-5(b).

The Court notes that the comment to Rule 2:5-5(a) states: "While paragraph (a) of this rule does not include an express provision for supplementation of the record made in a judicial proceeding, where appropriate the appellate court may, on motion, remand to the trial court for that purpose." The comment cites R. 2:9-1 and *Kohn's Bakery, Inc. v. Terracciano*, 147 N.J. Super. 583 (App. Div. 1977) for this proposition. Plaintiff argues that

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the *Kohn's Bakery* case only applies in situations where the record is incorrect. However, the Appellate Division in *Kohn's Bakery* commented that plaintiff's attorney had failed to make a motion pursuant to R. 2:5-5 to correct or supplement the sparse record below. The *Kohn's Bakery* case was not an administrative matter. Nonetheless, the Appellate Division remanded the case so that in the interest of justice, plaintiff could bring a motion in the trial court asking for an opportunity to correct or supplement the sparse record below.

The Court Rules themselves permit a liberal reading of R. 2:5-5(a). Rule 1:1-2 which deals with the construction and relaxation of the Rules of the Court states that: "Unless otherwise stated, any rule may be relaxed or dispensed with by the Court in which the action is pending if adherence to it would result in an injustice." Plaintiff questions "...why the interests of justice require that an appellant should have the opportunity to rebut reasonable inferences found by a trial court, where that Court has based its decision on a record containing the fully developed arguments of both parties, indeed, a record devoid of any claim of error?" See Page 2 of plaintiff's Brief in Opposition to Defendants' Motion. Under the circumstance of this case, where defendants inadvertently failed to file the certification of Mr. Paschon and Ms. Zahn with their Order To Show Cause, it is in the interest of justice to both parties that defendants be allowed to supplement or enlarge the record. The defendants should have the opportunity to present all of their evidence. At the same time, plaintiff must have a chance to meet defendants' proofs. It is in the sound discretion of the trial court to hear additional testimony which was previously inadvertently omitted. The Appellate Division would not have remanded this matter to this Court if the trial court lacked the power to enlarge or supplement its record. Defendants' motion to enlarge the record is therefore granted.

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As a result of this Court's initial determination that defendants should be permitted to supplement the record, the Court must next decide whether or not to reconsider its ruling on defendants' Order To Show Cause to re-open the final judgment. Defendants' supplemental certifications and the testimony of Mr. Paschon and Ms. Zahn seek to explain why defendants waited eleven months before petitioning the Court to vacate the final judgment. According to Mr. Paschon's May 9, 1984 certification, he and Mr. Kotzas on December 22, 1983 "...decided to pay the tax arrearages on the property, and . . . instructed (the Law) firm's bookkeeper, Ellen Zahn, to inquire of the Tax Collector as to the total amount then due." See page 3 of Mr. Paschon's May 9, 1984 certification. Ms. Zahn has certified and testified she called the Tax Collector's office on December 22, 1983 to inquire as to the amount of taxes due on Block 685, Lots 5, 6, and 7 and that she was told that said property had been foreclosed by the Township. See Ellen Zahn's May 3, 1984 certification, page 2. This was the first notice Mr. Paschon had of the foreclosure proceedings against Block 685, Lots 5, 6, and 7.

The supplemental testimony of Mr. Paschon and Ms. Zahn revealed that defendants Paschon and Kotzas owned the property in question for about ten (10) years prior to the foreclosure. When, in December of 1983, Ms. Zahn was told to inquire as to the amount of taxes due on Lots 5, 6, and 7, she discovered in defendant's office file regarding this property that no tax bill had been received since 1980. The cross-examination of Mr. Paschon further disclosed that he was aware that tax searches had been ordered on the subject property at the time that defendants made a donation of other land out of the same parcel of land to Brick Hospital. Though Mr. Paschon did not recall when those searches were ordered nor what they revealed, the previously filed

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certification of Mr. Leone, the Business Administrator of Brick Township, indicates that the tax searches were ordered in 1980 and that these searches showed the correct tax status of the properties. Mr. Paschon also testified that he had not inquired as to the tax status of Lots 5, 6, and 7 prior to December, 1983 because for the six-month period just prior to that time he was involved in a long and difficult trial. Once that litigation was over he decided to put his business life in order and to check on the taxes due on his properties.

This additional evidence provided by defendants goes to the issue of whether or not defendants' application to re-open the final judgment pursuant to Rule 4:50-1 was made within a reasonable time. Rule 4:50 deals with relief from a judgment or order. The grounds for such relief are listed in Rule 4:50-1. When previously before this Court on their Order To Show Cause, defendants sought relief from the foreclosure judgment under subsections (a), (b), (d), and (f). Rule 4:50-2 requires that a motion for reasons (a) and (b) be made not more than one year after entry of the judgment or order. A motion based on any of the other grounds enumerated in Rule 4:50-1 shall be made within a reasonable time. Since defendants' Order To Show Cause to vacate the foreclosure judgment was filed eleven months after the final judgment was entered, their motion was obviously timely as to grounds (a) and (b). Thus, the question remains whether or not defendants' motion was made within a reasonable time for purposes of subsections (d) and (f) of Rule 4:50-1.

Subsection (f) of Rule 4:50-1 is a "catchall" provision which allows the Court to vacate a judgment for any other reason justifying relief from the operation of the judgment or order. Where a judgment or order is void it may be vacated by the Court pursuant to Rule 4:50-1(d). The reasonable time limitation within

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which motions under these sections must be filed is not specifically defined. The facts and circumstances of each case determine whether or not the motion was made within a reasonable time. In this case defendants learned on December 22, 1983 that a final tax foreclosure judgment had been entered against their property on February 9, 1983. On January 13, 1984 defendants applied to this Court for relief from said judgment. Considering that defendants petitioned this Court within the one year limitation for reasons (a) and (b) under Rule 4:50-1 and that they acted quickly once they chose to act with reference to the tax arrearages on Lots 5, 6, and 7, it is in the interest of justice to deem their application timely pursuant to Rule 4:50-2 and to consider, or more appropriately reconsider, their motion on the merits. Thus defendants' motion for reconsideration of their Order To Show Cause why the final foreclosure judgment should not be vacated is granted.

Defendants raise two issues on the merits. The first is whether or not the final foreclosure judgment is void on the grounds that the notice of the foreclosure proceedings given defendants by the Township was inadequate to satisfy the demand of due process. This procedural due process argument is made with reference to Rule 4:50-1(d) which allows the Court to set aside a judgment that is void if the petition for such relief is brought within a reasonable time. At the outset, defendants concede that the Township complied with the notice provisions of both the *In Rem* Foreclosure Statute, N.J.S.A. 54:5-104.29 et seq., and Rule 4:64-7. However, they argue that such mechanical compliance with the Statute and Rules of Court does not insure compliance with due process requirements.

Due process demands "notice reasonably calculated, under all of the circumstances, to apprise interested parties of the

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pendancy of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, at 314 (1949). Specifically, the United States Supreme Court held in *Mullane* that notice by publications is not sufficient with respect to an individual whose name and address are known or easily ascertainable. With regard to owners of property which is sought to be foreclosed on, the law currently requires that the foreclosing authority mail a notice of the foreclosure proceedings to the owner at the address which appears on the municipality's tax rolls. *Township of Montville v. Block 69, Lot 10*, 74 N.J. 1 (1977). The New Jersey Supreme Court determined in the *Montville* case that notice of the tax foreclosure action mailed to the address listed on the tax rolls meets both the state and federal constitutional due process requirements. In reaching this conclusion, the Court stated that the minimal additional effort necessary on the part of the foreclosing municipality by virtue of the mailing requirement was outweighed by an individual's interest in retaining his property. *Montville, supra*, at 19.

In the instant case, Brick Township sent notice of the foreclosure proceeding to defendant Paschon at the address listed on its tax rolls. Certainly, checking the tax records for an owner's name and address and mailing a notice to said address takes minimal effort. Defendants, however, urge this Court to place a much greater burden on the foreclosing municipality. They argue that it is the Township's duty not only to check its tax records with regard to the properties sought to be foreclosed, but in addition to review such outside sources as the Lawyer's Diary and the telephone book to ascertain a possibly more current address of the delinquent taxpayer. Indeed, defendants suggest that if this additional research reveals several addresses for the owner, the Township must mail a notice to each such address to make sure that the owner is now aware of the pending

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foreclosure action. Placing this kind of an extensive, additional burden on plaintiff is not in line with due process requirements announced in our case law.

The *Montville* case specifically held "that where all owners name and address appear on the municipality's tax rolls, notice *must* be sent by mail before a taxpayer's right to redeem his property may be foreclosed." *Montville, supra*, at 19 and 20. Here this was done. In a companion case to *Montville*, the New Jersey Supreme Court refused to place "the affirmative duty of ascertaining whether the name and address listed on (the) tax rolls are correct" on the municipality. *Atlantic City v. Block C-11, Lot 11*, 74 N.J. 34, 39-40 (1977). Even the U.S. Supreme Court in *Mullane* recognized that "impracticable and extended searches are not required in the name of due process." *Mullane, supra*, at 317-318. Defendants claim that by virtue of correspondence in March of 1982 with the plaintiff regarding Block 685, Lot 8 the Township knew of defendant's new address prior to instituting this action. Requiring plaintiff to check its tax rolls as to all properties owned by the title holder of a piece of property being foreclosed amounts to an impracticable and extended search not demanded by procedural due process. Similarly, reviewing outside sources such as telephone directories and the Lawyer's Diary constitutes an extended search not required by due process.

Defendants rely on the U.S. Supreme Court's decision in *Mennonite Board of Missions v. Adams*, ____ US ____, 77 L. Ed. 2d 180 (June 22, 1983) to support their contention that the Township failed to meet due process notice requirements. That case is factually distinguishable from the matter before this Court. In *Mennonite* the U.S. Supreme Court held that where a "mortgagee is identified in a mortgage that is publicly recorded, constructive notice by publication must be supplemented by notice

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mailed to the mortgagee's last known available address, or by personal service." *Mennonite, supra*, at 187. Anything less violates due process because constructive notice by publication or posting is not reasonably calculated to apprise the mortgagee of a tax sale which significantly affects his substantial interest in the property being foreclosed. Thus, the *Mennonite* case seeks to protect mortgagees and other creditors whose addresses and identities can be readily ascertained from public records from losing their interest in property at a tax sale without notice of such a proceeding. Unlike owners, mortgagees are less likely to be aware that the property may be sold for delinquent real estate taxes. With respect to both owners and mortgagees, the Constitution requires that the Township mail notices to the last known address available for such interested parties on public records.

If defendants are correct in that the *Mennonite* case requires the Township to do more than mail a notice to the last known address revealed by its records, then this Court believes that the ruling in *Mennonite* has expanded the requirements of procedural due process and thus changed the law. Since the *Mennonite* case was decided after the final judgment was entered in this case, such an expansive interpretation of its holding should not be given retroactive effect. The issue of retroactive application of judicial decisions is by no means settled or certain. Whereas here the Supreme Court is silent as to whether or not its ruling should apply retroactively it is the trial court's "responsibility on the basis of a complete record to anticipate the Supreme Court's views in light of its expressions in other fields where it has expressly dealt with the retroactivity." *Commonwealth of Penna. v. Kervick*, 60 N.J. 289, 296 (1972).

There are four approaches to the problem of retroactivity. In applying these various approaches, no apparent distinction is

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made simply on the basis of whether a case is civil or criminal. *State v. Nash*, 64 N.J. 464 (1974). The first approach recognizes the Court's power to hold that an overruling decision operates prospectively only and does not even affect the rights of the parties to the case declaring the new rule of law. Another approach limits the retroactive effect of a new rule so that it will govern the rights of the parties to the overruling case but the old rule applies to the rights of parties to all other pending litigation as well as litigation terminated by final judgment. A third approach permits the new rule to govern the rights of parties to the overruling case and the rights of parties to other cases pending when the overruling case was decided. Pending cases include all cases where final direct review has not been exhausted. Pursuant to this approach, the old rule applies to the rights of parties in cases terminated by a final judgment no longer appealable at the time of the decision in the case declaring new law. The fourth approach is that a new rule may be given general retroactive effect. Thus, the new rule will even apply where final judgments have been obtained as of the time the overruling case is decided.

There is no constitutional mandate requiring one of the four approaches to retroactivity to be applied in a given case. The United States Supreme Court has taken the position that certain competing considerations must be weighed in each case to decide which approach should apply. The Court in each case should examine:

1. the purpose of the rule and whether it would be furthered by a retroactive application.
2. the degree of reliance placed on the old rule by those who administered it.

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3. the effect a retroactive application would have on the administration of justice.

Linkletter v. Walker, 381 U.S. 618 (1965). This weighing process has generally been followed in New Jersey, *State v. Johnson*, 43 N.J. 572 (1965) aff'd. 384 U.S. 719 (1966); *Darrow v. Hanover Twp.*, 58 N.J. 410 (1971); *State v. Koch*, 118 N.J. Super. 421 (App. Div. 1972).

The purpose of the rule in *Mennonite* is to protect the due process rights of record lien holders. This purpose will not be furthered by punishing the Township in this case for not having taken greater steps to notify owners of property on which the taxes are in arrears. In adopting the notice procedure followed by the Township in this case, the Township reasonably relied on the *In Rem* Foreclosure Statute, the Rule of Court and the *Montville* decision. As the New Jersey Supreme Court recognized in the *Montville* case, making a rule such as the one in the *Mennonite* and *Montville* cases fully retroactive will result in uncertainty of a great number of titles to land. Such uncertainty is detrimental not only to the individual title holders but to the general public as well because while a title is uncertain the Township cannot determine whom to look to for the payment of property taxes, an important if not vital source of revenue on which the public at large depends and from which it benefits. It is also obvious that the cost and administrative burden of relitigating innumerable *In Rem* Tax Foreclosure cases under the *Mennonite* rule is substantial. Finally, a decision should not be given retroactive effect if vested contract or property rights will thus be disturbed. *Inganamort v. Fort Lee*, 131 N.J. Super. 558 (Ch. Div., 1974). Because of the nature of *In Rem* Foreclosures it is also clear that making the *Mennonite* case fully retroactive will disturb vested contract or property rights. For these reasons

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and "to avoid upsetting settled titles based on foreclosure proceedings," *Montville, supra*, at 20, the *Mennonite* decision does not govern the case before this Court.

Defendants argument that any knowledge which Mr. Foster, the Township attorney, had regarding defendants' current address must be imputed to the Township itself for due process purposes is without merit. There is no evidence before this Court to prove that Mr. Foster knew defendant's correct address and despite such knowledge mailed the foreclosure notice to their old address. Defendants rely on the case of *Federal Deposit Ins. Corp. v. Morrison*, 568 F. Supp. 1240 (1983). In that case the FDIC foreclosed on real property securing a promissory note co-signed by defendant Morrison. The FDIC mailed a notice to Morrison at an address appearing on the face of the note. It was apparent from the note itself that this was not Morrison's correct address. Furthermore, previous mailings to Morrison at that address had been returned undeliverable. Thus, the FDIC knew when it mailed the foreclosure notice that that notice would not reach Morrison. The Court held that the FDIC's efforts at notifying Morrison by mail failed to meet due process requirements. In this case Mr. Foster could not tell that the address on the tax records was outdated, nor did he know in advance that the foreclosure notice would be undeliverable at the address listed on the tax records.

In support of their argument that Mr. Foster, and therefore plaintiff, had actual knowledge of defendants' correct address, defendants have also cited *Robinson v. Hanrahan*, 409 U.S. 38 (1972). Mr. Robinson was arrested and jailed for armed robbery. The State of Illinois instituted forfeiture proceedings against Mr. Robinson's car. Notice of these forfeiture proceedings was mailed to Mr. Robinson's home even though the State knew he was in jail. The Court held that the State had failed to make an effort

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to provide notice reasonably calculated to apprise Mr. Robinson of the pending forfeiture action. Again, this Court does not find that in this case Mr. Foster, or the Township, had the kind of knowledge with respect to defendants' current address to warrant a holding that defendants' procedural due process rights have been violated.

Aside from the case law, the *In Rem* Tax Foreclosure Statute itself is relevant to the issue of whether or not any additional burden should be placed on the municipality with reference to providing owners with notice of foreclosure proceedings. This Statute ". . . involves an area of special legislature concern, dealing as it does with the matter of enforcing the collection of municipal taxes and the settlement of tax title liens." *New Shrewsbury Borough v. Block* 115, Lot 4, 74 N.J. Super. 1, 9 (App. Div. 1962). The purpose of the *In Rem* Foreclosure Act as stated by the Legislature in N.J.S.A. 54:5-104-31 is to encourage the barring of rights of redemption. Furthermore, public policy favors tax sale foreclosures ". . . to assist municipalities in the collection of delinquent taxes." *Lonsk v. Pennefather*, 168 N.J. Super. 178, 182 (App. Div., 1979) citing *Bron v. Weintraub*, 42 N.J. 87, 91 (1964) and *Kerr v. Trescher*, 34 N.J. Super. 437, 441 (Ch. Div. 1955).

Though Rule 4:50-1 controls defendants' motion to vacate the foreclosure judgment, judicial deference is due with respect to the Legislature's expression of public policy in the *In Rem* Foreclosure Act. *New Shrewsbury Borough, supra*, at 9. The Statute provides for a three month's limitation on making a motion to open a tax foreclosure judgment on grounds other than lack of jurisdiction or fraud. N.J.S.A. 54:104.67. Defendants did not apply to this Court for relief from the foreclosure judgment until eleven months after it was entered. Defendants have not challenged

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the final judgment on the grounds of fraud or lack of jurisdiction. Their argument that the judgment should not stand on the grounds of a violation of procedural due process fails for the reasons stated above. Thus defendants' motion to vacate the foreclosure judgment pursuant to Rule 4:50-1(d) because it is void is hereby denied.

Defendants have raised a second issue on the merits. They argue that the Court should not allow the final foreclosure judgment to stand because it is inequitable and unfair. Defendants make this argument pursuant to Rule 4:50-1(f). If this foreclosure judgment is allowed to remain in effect, plaintiff will get a windfall by virtue of the fact that current value of Lots 5, 6, and 7 far exceeds the amount of taxes due on those lands. However, this problem arises in every foreclosure action where an owner seeks to vacate a judgment so that he can redeem the property. The existence of a disparity between the amount owed and the value of the property is not a sound nor sufficient basis for vacating a final foreclosure judgment. If it were, a delinquent taxpayer could redeem his property at any time before the tax arrearages caught up to the fair market value of the land. Clearly, this is not the state of the law.

The final foreclosure judgment entered in this action on February 9, 1983 is neither void on the grounds that plaintiff violated defendants' right to procedural due process, nor should it be vacated in the interest of justice because plaintiff will get a windfall if the judgment stands. There has been no evidence presented to this Court that defendants were surprised to learn that the real estate taxes on Lots 5, 6, and 7 were in arrears in 1983. Defendants may have been surprised to discover that a final judgment had been entered eleven months before they chose to inquire as to the amount of taxes owed on this property. However,

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the Township did everything constitutionally required of it to put defendants on notice that they would lose their land for non-payment of taxes. Defendants' motion pursuant to Rule 4:50-1(f) is hereby denied.

There is no reason in fact, law, or equity for allowing these defendants, who were owners of property on which they allowed the real estate taxes to remain unpaid for several years, to redeem after the Township has done everything legally necessary to obtain a valid tax foreclosure judgment. Allowing a taxpayer to redeem his property whenever he decides to pay the delinquent taxes emasculates the *In Rem* Foreclosure Statute and is not in the interest of justice. Judicial deference should be accorded the Statute and its purpose to the extent that it does not violate our state or federal constitutional law. For the reasons stated herein and the reasons announced in this Court's oral opinion of February 2, 1984, the defendants' application to vacate the final foreclosure judgment is hereby denied.

**APPENDIX F—ORDER OF TRIAL COURT DATED
SEPTEMBER 5, 1984 FILED SEPTEMBER 5, 1984**

WILENTZ, GOLDMAN & SPITZER
A Professional Corporation
900 Route 9, P.O. Box 10
Woodbridge, New Jersey 07095
201-636-8000
Attorneys for defendants,
Robert V. Paschon and Byron Kotzas

**SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
OCEAN COUNTY**

Docket No. F-146-82

Civil Action

**TOWNSHIP OF BRICK, a municipal corporation of the County
of Ocean and State of New Jersey,**

Plaintiff,

-vs-

**BLOCK 48-7, LOTS 34, 35, 36, Kenlav, c/o Party Time Inn,
and other lands,**

Defendants, and

ROBERT V. PASCHON and BYRON KOTZAS,

Defendants.

*Appendix F***ORDER ENLARGING RECORD AND DENYING
RECONSIDERATION OF ORDER OF MARCH 1, 1984**

This matter having come before the Court on July 18, 1984 upon the application of Wilentz, Goldman & Spitzer, a Professional Corporation, attorneys for defendants' Robert V. Paschon and Byron Kotzas, for the relief sought in the Notice of Motion dated June 15, 1984 for an Order enlarging the record and for reconsideration of this Court's Order of March 1, 1984; and written notice of the aforesaid motion having been given to Messrs Starkey, Kelly, Blaney & White, attorneys for plaintiff; and Wilentz, Goldman & Spitzer, a Professional Corporation, by Frederic K. Becker, Esq. having appeared in support of the aforesaid application, and Messrs. Starkey, Kelly, Blaney & White, by Charles E. Starkey, Esq. having appeared in opposition thereto;

And the Court having read and considered the pleadings filed in this matter and the papers filed in connection with this application, as indicated at the foot of this Order; and the Court having heard and considered the testimony presented and the oral arguments of counsel; and for the reasons set forth by the Court in its rulings from the Bench on July 18, 1984 and in its written opinion dated July 30, 1984; and good cause appearing for the entry of the within Order; it is on this 5th day of September, 1984, ORDERED as follows:

1. Defendants' application for an Order enlarging the record of the proceedings in this cause by the inclusion thereof of the Certifications of Robert V. Paschon dated May 9, 1984 and of Ellen Zahn dated May 3, 1984, and of the oral testimony of Robert V. Paschon and Ellen Zahn presented to this Court on July 18, 1984, be and the same is hereby granted and the record of the proceedings in this cause is hereby enlarged to include said Certifications and said oral testimony; and

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2. The application for reconsideration of this Court's Order of March 1, 1984 be and the same is hereby denied.

s/ Henry H. Wiley, J.S.C.
Henry H. Wiley, J.S.C.

The following were considered by the Court in connection with the application in this matter:

A. Motion papers filed on behalf of defendants on June 15, 1984:

1. Motion For Enlargement Of Record And For Reconsideration Of Order Of March 1, 1984, dated June 15, 1984, including Appellate Division Order filed May 31, 1984, Certification of Robert V. Paschon dated May 9, 1984, and Certification of Ellen Zahn dated May 3, 1984.

2. Brief of defendants in support of motion, dated June 15, 1984.

3. Appendix of defendants in support of motion.

B. Answering papers:

4. Brief of plaintiffs in opposition to motion.

C. Reply papers:

5. Reply brief of defendants in further support of motion, dated July 17, 1984.

**APPENDIX G—ORDER OF SUPERIOR COURT,
APPELLATE DIVISION, DATED MAY 25, 1984, FILED
MAY 31, 1984**

ORDER ON MOTIONS/PETITIONS

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION**

**DOCKET NO: A-3254-83T3
MOTION NO. M-3995-83
BEFORE PART E**

**JUDGES: BISCHOFF
PETRELLA
BRODY**

**TOWNSHIP OF BRICK, a municipal corporation of the County
of Ocean and State of New Jersey,**

VS.

**BLOCK 48-7, LOTS 34, 35, 36, Kenlav, c/o Oarty Time Inn,
and other lands,**

VS.

ROBERT V. PASCHON and BYRON KOTZAS,

MOVING PAPERS FILED May 11, 1984

DATE SUBMITTED TO COURT May 22, 1984

DATE DECIDED May 25, 1984

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ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS HEREBY ORDERED AS FOLLOWS:

MOTION TO SUPPLEMENT THE RECORD ON APPEAL	DENIED	OTHER
	X	X

SUPPLEMENTAL:

The matter is remanded to the trial court for the specific purpose of permitting appellant to make this application to the Chancery Judge. Should the application be granted, the appellant has leave to move in the trial court for reconsideration of the order under review. Appellant shall make his application within ten (10) days of receipt of this order.

The record with the findings of the trial court shall be returned to this Court on or before August 1, 1984.

Jurisdiction is retained.

FOR THE COURT:

s/ William G. Bischoff
WILLIAM G. BISCHOFF
P.J.A.D.

WITNESS, THE HONORABLE WILLIAM G. BISCHOFF,
PRESIDING JUDGE OF PART E, SUPERIOR COURT OF
NEW JERSEY, APPELLATE DIVISION, THIS 25th DAY OF
MAY 1984.

s/ Elizabeth McLaughlin
CLERK OF THE APPELLATE DIVISION

**APPENDIX H—ORDER OF TRIAL COURT DATED
MAY 3, 1984**

PASCHON, FEUREY AND KOTZAS, ESQS.
1005 HOOPER AVENUE
TOMS RIVER, NEW JERSEY 08753
(201) 341-3900

Attorneys for Defendants:

Robert V. Paschon and Byron Kotzas;

**SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
OCEAN COUNTY**

DOCKET NO. F-146-92

CIVIL ACTION

TOWNSHIP OF BRICK, a Municipal Corporation of the County
of Ocean, State of New Jersey,

Plaintiff;

VS

BLOCK 48-7, Lots 34, 35, 36, 37, 38, 39 assessed to Kenlav &
Party Time Inn, and other lands;

Defendants;

ORDER

THIS MATTER having been brought before the Court by
Garrett L. Joest, III, attorney for defendants Robert V. Paschon
and Byron Kotzas, t/a Cedarbridge Associates, Charles E. Starkey,

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Esq., appearing for plaintiff Township of Brick, and the Court having considered the moving papers and the arguments of counsel,

IT IS ON THIS 3rd day of May, 1984, ORDERED AND DIRECTED that the Order of this Court dated March 1st, 1984 denying defendants' motion to vacate judgment of foreclosure be stayed pending outcome of the defendants' appeal.

IT IS FURTHER ORDERED that the defendants shall produce a supersedeas bond within 15 days after the determination of the amount thereof in an amount to be agreed upon, representing the estimated tax on the lots in question for a period of one (1) year from the date of the filing of the appeal and further, including the estimated attorneys fees and costs of the plaintiffs in defending the appeal.

s/ Henry H. Wiley, J.S.C.
HENRY H. WILEY, J.S.C.

**APPENDIX I—ORDER OF TRIAL COURT DATED MARCH
1, 1984 FILED MARCH 2, 1984**

STARKEY, KELLY, BLANEY & WHITE
522 Brick Boulevard / P.O. Box 610
BRICK TOWN, NEW JERSEY 08723
(201) 477-1610
Attorneys for Plaintiff

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
OCEAN COUNTY

Docket No. F-146-92

CIVIL ACTION

Plaintiff

TOWNSHIP OF BRICK, a Municipal Corporation of the County
of Ocean, State of New Jersey,

vs.

Defendant

BLOCK 48-7, Lots 34, 35, 36, 37, 38, 39 assessed to Kenlav &
Party Time Inn, and other lands

ORDER

This matter having come before the Court on return date
of an Order to Show Cause and the Court having reviewed and
considered all of the affidavits, certifications, briefs and arguments
of counsel, Garrett L. Joest, III, Esq., of Paschon, Feurey &

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Kotzas having appeared on behalf of the moving parties, Paschon and Kotzas and Charles E. Starkey, Esq. of Starkey, Kelly, Blaney & White, appearing on behalf of plaintiff, Township of Brick, and the Court being of the opinion that good cause exists for entry of the within Order;

It is on this 1st day of March, 1984 ORDERED: that the judgment of foreclosure heretofore entered on lots 5, 6, and 7 in Block 685 be and hereby is confirmed in all respects;

It is further ORDERED that the Lis Pendens heretofore filed by the moving parties be and hereby is discharged and the Ocean County Clerk is authorized and directed to note said discharge on its records;

It is further ORDERED that the motion and Order to Show Cause be and hereby are dismissed with prejudice and without costs.

s/ Henry H. Wiley, J.S.C.
HENRY H. WILEY, J.S.C.

Dated: February 16, 1984

**APPENDIX J—TRANSCRIPT OF ORDER TO SHOW CAUSE
BEFORE TRIAL COURT ON FEBRUARY 2, 1984**

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION — OCEAN COUNTY
DOCKET NO. F-146-82
APPEAL NO. not available

BRICK TOWNSHIP,

Plaintiff.

-v-

BLOCK 48-7, Lots 34, etc.

Defendant.

TRANSCRIPT OF ORDER TO SHOW CAUSE

B E F O R E:

HON. HENRY H. WILEY, J.S.C.
Ocean County Courthouse
Toms River, N.J.

February 2, 1984

A P P E A R A N C E S:

STARKEY, KELLY, BLAKEY & WHITE, ESQS.,
BY: CHARLES E. STARKEY, ESQ.
For the Plaintiff

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PASCHON, FEUREY & KOTZAS, ESQS.,
BY: GARRETT L. JOEST, III, ESQ.,
For the Defendants.

Ordered for appeal by: Garrett L. Joest, III, Esq.

DAYETTE J. ZAMPOLIN, C.S.R.
Official Court Reporter
Ocean County Courthouse
Toms River, N.J.

* * *

[Commencing at page 10]

THE COURT: This is a return day of an Order to Show Cause to open up a judgment by default in an in rem tax sales certificate foreclosure. The plaintiff, Township of Brick, obtained a foreclosure against some 75 parcels of land that are listed in the complaint. One of the parcels included Lots Five, Six and Seven in Block 685, assessed to Robert V. Paschon and Byron Kotzas.

The address on the duplicate at the time the complaint was filed was 1277 Hooper Avenue, and the Statutory requirement of mailing notice to the address on the tax duplicate was complied with, as well as the publication.

[11] And it's been conceded by the attorney for the moving party, the defendants Paschon and Kotzas, that the Statutory and Rule requirements

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have been met, as well as the requirements of the *Montville* case, which added the requirement of sending notice by mail. So I find that all the Rule, law, and procedural requirements have been met in the foreclosure proceeding.

The moving party doesn't really rely on the Statute, because the Statute says under Section 54:5-87, and New Jersey Statutes Annotated 54:5-104.67 provide that the judgment can only be opened within three months after the entry of the judgment, and then only for lack of jurisdiction or fraud in the conduct. And there's no fraud here; and of course, I think the Court has jurisdiction.

So that the plaintiffs then turn to the Rule, Rule 4:50-1, and seek to obtain relief from a judgment on the grounds of either A, B—I don't think C is even suggested, that's fraud; or D, which is: A judgment is void for lack of jurisdiction, or a judgment is void; and F: Any other reasons justifying relief from the operation of the judgment of the order—or the order.

And I believe the burden in this type of a [12] situation is on the party that seeks to set aside the order where it's regular on its face, and where all the procedural requirements have been met; which he, that is, the moving party, meets one of those reasons.

Now, under A, the reasons are stated. those are: Mistake, inadvertence, surprise or excusable

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neglect. And the moving party then has to show that there's been a mistake, that there's been some inadvertence, that there's surprise or excusable neglect.

And as I read the affidavits of Mr. Kotzas or Mr. Paschon, they don't really explain their conduct. They, in turn, attempt to put the burden on the Municipality and say, in effect, because an attorney who handled the foreclosure should have known of the address of either Mr. Kotzas or Mr. Paschon, that therefore, it was his obligation to personally see that the address on the tax duplicate was the actual present address of the party who's listed as the owner.

That would be adding an additional requirement to the *Montville* case or to the Rules, or to the Statutes on in rem tax sales certificate foreclosure, and I don't think it's my function to [13] add those type of requirements to the Rule.

Because if you were going to do that, I think you'd have to do it right across the board. That would mean that the attorney who was handling the tax sales certificate foreclosure would have to make an independent investigation as to the address that was given. He couldn't rely on what's on the tax duplicate; because we know addresses—people move, change, addresses might be wrong, just given by mistake and so forth.

And so you would be adding that requirement

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to the *Montville* case, in my opinion. And I don't see that there's any reason that I should as a trial Judge add that requirement. I think that would be a substantial burden or additional burden to be put on the Municipality.

And in this type of a case; that is, the in rem tax sale certificate foreclosures, you're really weighing the equities here of: (1) Getting property back on the tax rolls; and (2) Preserving the interest of a person who owns property or has property in his name.

Now, if the foreclosure is done on a *personam* basis, then we have a much different burden. Then there has to be a search and much [14] more work done.

So the Legislature intentionally set up a different criteria where the foreclosure was being done by the municipality. And as to that, initially, all you had to do was publish and post.

Then they increased that with the *Montville* case in sending out the letter. But they haven't gone past that to my knowledge. Those are the two requirements. And the reason I think they do that is because taxes are a burden on everybody, and they want this vacant property to get back on the tax rolls. And it's—it's, I think, an accepted principle that it's an obligation of every person who owns property to pay his share of the taxes.

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The Municipality doesn't have to run after him, beg him, get down on their hands and knees, please pay your taxes. That's his responsibility in the first instance. And in this case, it seems to me that these two men, Paschon and Kotzas, really were using this—this property as an investment.

They would wait 'till the last minute before they'd pay the taxes, because it was to their advantage not to have their money tied up in the property. They would use it for some other means. [15] They would wait 'till they got some type of a warning or notice, or wait 'till the last minute and then come back and pay.

And I think really that that doesn't show to me the type of mistake, inadvertence, surprise or excusable neglect. That shows to me that these men are handling this property in a particular way to their own financial advantage, and really, to the disadvantage of the Municipality.

Now, we have a couple cases that do give us some indication of when the Court should intercede and set the judgment aside. One of the earlier cases is the case by Judge Kilkenny, *Borough of New Shrewsbury versus Block 115, Lot four*. That appears in 74 New Jersey Superior, one. It's Appellate Division case, and that's the case that really said that the three months referred to in the Statute should give way to the Rule, under Rule 4:50, opening a judgment.

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So he set that up, and that's been followed. But in that case, he sent the matter back to see if the Township attorney really had acted fairly, because of the notice they had received, the attempt to redeem and so forth. And in addition, the time period in the new *Shrewsbury* case was [16] three months. Here we have close to 11 months that the parties waited.

And the other case is *Bergen-Eastern Corporation versus Koss*, K-O-S-S. That case appears in 178 New Jersey Superior, 42. Also, the Appellate Division.

Here we had a 74 year old woman who had a history of continuing serious psychiatric problems, with several hospitalizations for mental illness. And Judge Bottr in the *Koss* case said, in effect, well, this woman really didn't understand what was going on here. And it was her own home she was living in.

So the trial Judge felt that law there was the type of inadvertence, excusable neglect that the Court should intervene. And in that case, the time period was also short, three months limit time period. And the trial Judge said: Yes. This homeowner, elderly woman, 74, serious mental problems, should have a right to redeem.

And that—and those two cases, I think, give us the flavor of the excusable neglect, or any other reason justifying relief as set forth in Rule 4:50-1.

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But in this case, we have two astute [17] businessmen, one is an attorney, the other is a real estate broker. They knew the taxes weren't being paid because that was their modus operandi. They waited and let the taxes go in default, and then at the last minute or the last breath, came in and redeemed.

Here they waited almost the maximum time, because the Rule says one year you have to do that—do this, that's Rule 4:50-2, that it must be more than a year, for reasons A, B and C. Let's see, the Rule says: The motion shall be made within a reasonable time and for reasons A, B and C, not more than a year.

So they waited 'till the very last minute, not three or four months, but they waited almost the full period of time and then came in and attempted to redeem.

So I think that I have to weigh the equities here, and I don't think that it's fair to set up this really personal qualification. Because you see what could happen here, if you set this Rule in effect the way the moving party seeks, the person who happened to know the attorney would be all right. The person that the attorney didn't know, he'd go down the tubes, his property would be [18] foreclosed, because the attorney didn't know about it.

So the little old lady in her little old house,

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who didn't know this young attorney, and whose name isn't all over the place, because he's an attorney, or a broker, she's out, because he doesn't know her address has been changed, or doesn't know her present address, or doesn't know her from Adam, Adam's ox.

But in this case, the suggestion is because you know somebody, therefore, you have to go back and check, check to see the address that you know is the same address that's given in the tax duplicate. And I think that's not the way the burden lies. The burden is on the taxpayer, and it's his obligation to see that his address is correct and that he gets his—pays his taxes, and that the notice goes to him at that address.

So I think it's a matter of weighing the equity, the purpose of an *in rem* tax sales certificate foreclosure versus the property lying foul and no one paying taxes on it. And the procedure that has been implemented to encourage the municipalities to do this, so that it will be a relatively simple, straightforward procedure. And [19] you don't get into the arguments in the *in rem* cases that you do in the *personam* cases, and the searches that you have to make, and the investigations, and all the rest of it.

So that there's been a specific intent on the Legislature to make case procedure run smoothly and with certain requirements, but not more. Not the same ones you have in other types. And that

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as an overall favoring, I believe our cases say in the in rem tax sale certificate foreclosures that the Courts favor that procedure to proceed and to keep the judgment the way they are.

So I will deny the motion for the reasons that I've given. I ask Mr. Starkey to prepare the form of the order, submit it to Mr. Joest under our Five-Day Rule and back to the Court.

MR. STARKEY: Thank you, your Honor.

MR. JOEST: Thank you, your Honor.

THE COURT: All right. Thank you, gentlemen.

(Matter concluded.)